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ABSTRACT

This 1997 supplement to "The Law of Higher Education: A Comprehensive Guide to Lead Implications of Administrative Decision Making, Third Edition" (1995) (ED 383 256), includes discussions of court opinions, statutes, regulations, and related developments, and cites selected law journal articles, books, and other resources concerning the legal aspects of college administration. An introductory chapter gives an overview of postsecondary education law, its scope and evolution, the nature of court litigation, the public-private dichotomy, and the role of religion in this dichotomy. Subsequent chapters address specific topics: trustees/administrators/staff (sources and scope of authority, institutional liability for others' acts, institutional management of liability risk); faculty (nondiscrimination in employment, affirmative action, personnel decisions, academic freedom); students (legal status, admissions, financial aid, support services, disciplinary/grievance systems, grades/credits/degrees, procedures for suspension/dismissal/other sanctions, student protest/demonstrations, student organizations, sororities/fraternities, student press, housing, athletics, records, campus security, free speech and computer networks); the community (general principles, zoning/land use regulation, local taxation, community access to institutional property); state government (state regulation and out-of-state institutions, other state regulation); federal government (constitutional powers, regulation of postsecondary education, taxation, aid-to-education programs, civil rights); educational associations (accrediting agencies, athletic associations and conferences); and business/industrial community (purchasing, selling/competition, research collaboration). (MSE)

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ED 435 323

1997 SUPPLEMENT

THE LAW OF HIGHER EDUCATION

THIRD EDITION

WILLIAM A. KAPLIN
BARBARA A. LEE

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1997 SUPPLEMENT

THE LAW OF HIGHER EDUCATION

THIRD EDITION

WILLIAM A. KAPLIN
BARBARA A. LEE

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William A. Kaplin is professor of law at the Columbus School of Law, Catholic University of America, where he is also special counsel to the university general counsel. He has been a visiting professor at Cornell Law School and Wake Forest University School of Law; a distinguished visiting professor at the Institute for Higher Education Law and Governance, University of Houston; and a visiting scholar at the Institute for Educational Leadership, George Washington University. He is a former editor of *The Journal of College and University Law* and is currently a member of the advisory board for *Synthesis: Law and Policy in Higher Education*. In addition to the various editions and updates of *The Law of Higher Education*, Professor Kaplin has also coauthored *A Legal Guide for Student Affairs Professionals* (1997, with B. Lee) and various other books, articles, monographs ans reports on education law and policy and on constitutional law. He received his B.A. from the University of Rochester and his J. D. from Cornell University.

Barbara A. Lee is professor of human resource management at the School of Management and Labor Relations, Rutgers University, New Brunswick, New Jersey. She has also served as associate provost and acting dean. Professor Lee is a former member of the Board of Directors of NACUA, has chaired its Publications Committee and the editorial board of *The Journal of College and University Law*, and is currently a member of its editorial board, as well as the editorial board of *The Journal of Higher Education*. She is admitted to the New Jersey Bar, and serves on the Executive Committee of its Section on Labor and Employment Law. She received her B.A. from the University of Vermont, her M.A. and Ph.D. from the Ohio State University, and her J.D. from Georgetown University. She is the author or co-author of numerous books, monographs, pamphlets, and law review articles, including *A Legal Guide for Student Affairs Professionals* (1997, with W. Kaplin).

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Preface

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This volume updates and supplements an earlier volume, *The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decision Making* (Third Edition, 1995) [hereinafter "LHE 3d"], published by Jossey-Bass, Inc., Publishers, 350 Sansome Street, San Francisco, California 94104-1310. The *1997 Supplement* covers developments from publication of the Third Edition through mid-1997, and includes coverage of all major U.S. Supreme Court cases through the end of the 1996-97 court term.

We have included discussions of court opinions, statutes, regulations, and related developments, as well as cites to selected law journal articles, books, and other new resources. In selecting recent developments for inclusion, we have considered, primarily, the development's significance for higher education; the development's fit with the subject matter and themes of the Third Edition; and the development's usefulness for filling specific gaps in, clarifying, or updating specific points in the Third Edition. When selecting cases, we have also considered the completeness and helpfulness of the court's reasoning in the case.

The *1997 Supplement* is organized to parallel LHE 3d. Each recent development is keyed to a particular section or subsection of the Third Edition. Whenever a development modifies or extends a particular matter already discussed in the Third Edition, a specific page reference to the Third Edition is provided in parentheses: *e.g.*, "(see LHE 3d, p. 643)." Similarly, whenever a development can be better understood with reference to some background material in the Third Edition, a reference to the pages or subsection of the Third Edition is provided in parentheses. Internal cross-references to other sections of the *Supplement* are also used as appropriate: *e.g.*, "(see this Supp., Section 4.3)."

In addition to providing further developments of issues discussed in the Third Edition, and adding new developments where appropriate, we have endeavored to provide analysis and commentary on some of the more significant developments. This is particularly true for topics such as affirmative action (in both employment and admissions), academic freedom, free speech and the Internet, religious speech and religious liberty, and sexual harassment. To incorporate the new materials regarding the Internet, we have added two entirely new sections: 4.18 (Free Speech on Campus Computer Networks) and 7.2.18 (Regulation of Computer Network Communications). We have also added a new section 7.2.19 on the federal Medicare program and its application to medical schools.

Instructors wishing to order multiple copies of the *1997 Supplement* for use as a classroom text should contact Linda Henderson, NACUA, Suite 620, One Dupont Circle, NW, Washington, DC 20036, for information on quantity discounts. An instructional supplement (*Cases, Problems, and Materials: An Instructional Supplement to The Law of Higher Education* (3d ed. 1995) is also available for instructor and student use in conjunction with the Third Edition and the *1997 Supplement*; inquiries may be made with Ms. Henderson at the above address.

As with the Third Edition itself [p. xiii], the *1997 Supplement* is not intended as a substitute for the advice of legal counsel. Nor, in a problem-solving context, is it intended as a substitute for research into the primary legal resources or for individualized study of each legal problem's specific circumstances.

December 1997

William A. Kaplin
The Catholic University of America

Barbara A. Lee
Rutgers University

Acknowledgments

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We are also grateful to various individuals who assisted us in the research process and in the preparation of the manuscript. Gabrielle Fenlon expertly prepared the manuscript for the *Supplement*. Our research assistants -- Claire Milner, Jennifer Orzechowski, and Jack Calareso at Catholic University and Susan Fuller and Debra Casey at Rutgers University, were most helpful at every step of the process. Diana Botluk , reference librarian at Catholic University, and Diane Welsh, Law Clerk at NACUA, assisted with cite-checking. Barbara Kaplin provided proofreading assistance.

NACUA has provided continuing support for the dissemination of our work. We are grateful to Sheila Trice Bell, NACUA's chief executive officer, for her enthusiasm for the project. Our special thanks and gratitude go to Linda Henderson, Manager of Publications at NACUA, who has always been helpful and who has consistently shepherded this and earlier projects through to completion in a professional and supportive manner.

I

Overview
of
Postsecondary Education Law

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Sec. 1.1. How Far Does the Law Reach and How Loud Does It Speak?

Law's daily presence and impact on American campuses continue to grow without ceasing. Students, faculty members, administrators and staff, and outside parties (both corporate and individual) continue to be regularly involved in legal disputes in a wide range of dispute-resolution forums.

Almost all types of disputes that had become of critical importance by 1995 continued to play a similar role in 1997. There are, however, some changes in emphasis. In the world of technology, for instance, issues concerning access to and use of campus computer networks are arising with increasing frequency and presenting increasingly complex legal problems (see this Supp., Sections 4.18 & 7.2.18). In the arena of extracurricular student activities, new issues about mandatory student fees and their allocation have arisen in the wake of the U.S. Supreme Court's decision in the *Rosenberger* case (see this Supp., Sections 4.11.4 & 4.13.1). Similarly, issues concerning intercollegiate athletics have become even more prominent on the campuses and in the courts, from gender discrimination issues about support for women's athletic teams and the salaries of women's team coaches to disability discrimination issues about students' eligibility to compete.

In the academic realm, the classroom has increasingly become the venue for academic freedom disputes involving both faculty and students; a particular focus has been sexual harassment claims against faculty members based on classroom comments or assignments (see this Supp., Section 3.7.2). Similarly, in the academic realm, issues concerning student learning disabilities, and psychological and emotional conditions that may interfere with learning, have assumed major importance in regard to disability discrimination claims and related issues concerning the modification of academic standards (see this Supp., Section 4.7.4). And issues concerning affirmative actions policies in admissions as well as financial aid have once again become a center of attention (see this Supp., Sections 4.2.5 & 4.3.4).

Many interesting lawsuits in the past two years serve as illustrations of these new emphases. To take computers as one example, the federal government and state governments have promulgated various statutes regulating the transmission or retrieval of certain materials over computer networks, only to have those statutes challenged in court. After Congress passed the Communications Decency Act of 1996, for instance, pertinent portions of that Act were declared unconstitutional first by the U.S. district court and then by the U.S. Supreme Court (see this Supp., Section 7.2.18.1). A similar New York statute was invalidated by another U.S. district court as an undue burden on interstate commerce. And after Virginia passed a law prohibiting state employees from using state-owned computers to retrieve sexually explicit materials, a group of university professors challenged the law on grounds that it violated their academic freedom and their First Amendment free speech rights. Public colleges and universities have also been sued after implementing computer-use policies of their own creation. One state university, for instance, was sued after it had removed certain partisan political material from its campus computer network. Another state university was sued after blocking access of campus computer users to sexually explicit Internet news groups (see this Supp., Section 4.18). And another public university was sued in France because it established a website for its branch campus in France but provided information on its site only in English.

Sec. 1.2. Evolution of the Law Relating to Postsecondary Education

Numerous trends and developments are not only leading to new legal challenges for colleges, but are also changing the way that many colleges operate. The Internet and the World Wide Web, for example, have opened virtually unlimited channels of communication and information for faculty, staff and students. In turn, the development of web sites, the mushrooming use of Internet e-mail by faculty and students for pedagogical, as well as personal purposes, and the growth of computer- and telecommunications-assisted distance learning have spawned new challenges regarding intellectual property; free speech; harassment, invasion of privacy or defamation via the Internet; academic misconduct and plagiarism; and a multitude of other issues. These challenges have caused institutions to review, and sometimes modify, many of their existing policies, instructional methods, and operating procedures.

Another trend with special relevance for postsecondary education is the dialogue on the continued propriety of faculty tenure. Many legislators, some college presidents and a few faculty assert that tenure is unnecessary and that other systems that do not guarantee lifetime job security can still protect academic freedom (see, for example, Richard Chait, "Thawing the Cold War Over Tenure: Why Academe Needs More Employment Options," *The Chronicle of Higher Education*, February 7, 1997, B-4). And some institutions, such as Bennington College, have eliminated tenure without suffering a loss of student enrollment (Robin Wilson, "Bennington, After Eliminating Tenure, Attracts New Faculty Members and Students," *The Chronicle of Higher Education*, January 10, 1997, A-10). Other institutions have considered modifying their tenure systems, but have encountered substantial faculty resistance (William H. Honan, "University of Minnesota Regents Drop Effort to Modify Tenure," *New York Times*, November 17, 1996, p. 21). For a defense of traditional faculty tenure, see Matthew W. Finkin, *The Case for Tenure* (Cornell Univ. Press, 1996).

Student and faculty demographics continue to change as the U.S. population's diversity is increasingly reflected on campus. The U.S. population is aging (the median age was 32.9 in 1990, compared with 30.0 in 1980); this change is reflected in college enrollments, where the proportion of college students age 40 or older doubled from 1970 to 1993 (*Life After 40*, Institute for Higher Education Policy and Education Resources Institute, 1996). With respect to race and ethnicity, as the population ages, it will become more diverse. White, non-Hispanics were 69% of the U.S. population age 18 and under in 1990; they will be 61% of that cohort by the year 2005. African-Americans will increase from 15% of the population under age 18 (1990) to 15.6% by 2005. Hispanic youth, who comprised 12.2% of the under-18 population in 1990, will comprise 17% by 2005 (Census Data, reported in Janice Hamilton Outtz, "Higher Education and the New Demographic Reality," 76 *Educational Record* 65 (1995)). These demographic realities exacerbate the tensions over college admissions and hiring issues, given recent judicial rulings in affirmative action cases (see this Supp., Sections 3.3 and 4.2). More women are presidents of postsecondary institutions: their proportion increased from 5% in 1975 to 16% in 1995 (American Council on Education, *Higher Education and National Affairs*, Vol. 14, no. 16, September 11, 1995).

The increasing diversity of campus populations and an apparently increasing litigiousness in all sectors of campus life have led to increased conflict. Concern about the persistent problem of underage drinking has resulted in greater regulation of Greek organizations and other social clubs, as well as increased litigation against fraternities for the tragic consequences of underage drinking, fraternity hazing, and driving while intoxicated. Although some hate speech codes have been held unconstitutional, institutions continue to struggle to enforce laws and policies that prohibit harassment based on race, gender, and religion, and simultaneously to protect free speech and academic freedom on campus. Gays and lesbians are becoming increasingly vocal as they seek parity with heterosexuals with respect to funding for student organizations, employment benefits and campus housing for same-sex couples, and equal access to careers in the military. Students with disabilities -- particularly learning disabilities -- are challenging faculty and administrators' judgments with respect to course requirements, evaluation formats, and assignments. And graduate teaching assistants are clashing with faculty and administrators on many campuses over work assignments, the right to unionize, and the right to strike (Courtney Leatherman and Denise K. Magner, "Faculty and Graduate-Student Strife over Job Issues Flares on Many Campuses," *The Chronicle of Higher Education*, November 29, 1996, A-12).

Postsecondary institutions are finding that their legal liabilities are extending beyond the boundaries of the campus. For example, students enrolled in "internships" or "externships" for academic credit have sought to hold the institution liable for physical and/or financial injuries related to the off-campus experience. Similarly, students involved in study-abroad programs, or even field trips, have looked to the institution for redress when problems have occurred. The advent of the Internet has the potential to involve an institution in legal problems on the other side of the globe, even if the institution has no physical presence there.

In short, societal developments and technological breakthroughs are mirrored in the issues, conflicts, and litigation that now touch colleges and universities. The job of the university counsel has become even more challenging, and the work of scholars and students of higher education law even more fascinating, as these trends and developments combine and are played out on the campuses of U.S. institutions.

Sec. 1.4. Litigation in the Courts

1.4.3. Pretrial and trial issues.

1.4.3.2. Pretrial discovery. Another potential privilege of developing importance to postsecondary institutions is the "qualified privilege" that may protect from disclosure statements of students and employees made in the context of an ombudsperson's investigation or a mediator's mediation session. *Garstang v. Superior Court*, 46 Cal. Rptr. 2d 84 (Court of Appeal, 2d Dist., 1995), is illustrative. After an employee of the California Institute of Technology sued the institution and three co-workers, she sought to obtain information from university administrators about statements they made in meetings with a university ombudsperson who had attempted to resolve the situation that eventually precipitated the lawsuit. The parties agreed that California law did not recognize an "ombudsman privilege." Moreover, although the California Evidence Code contained a "mediation privilege" that might apply in lieu of an ombudsman privilege, the court ruled that this privilege was unavailable because the administrators meeting with the ombudsman had not agreed in writing (as then required by the Evidence Code) to apply the privilege to their discussions. Caltech also argued, however, that the right-to-privacy guarantee of the California Constitution was broad enough to support a qualified privilege applicable to the ombudsman sessions. The court agreed:

> A proper balancing of the competing values would here necessarily weigh in favor of the right to privacy of those individuals participating in the ombudsman sessions since the communications related to the private affairs of various Caltech employees, and were maintained in confidence by the institution. . . . Caltech gives to all employees a strict pledge of confidentiality and assurance that they may rely on the confidentiality, independence, and impartiality of the ombuds office [46 Cal. Rptr. 2d at 88-89].

Other states may not have a constitutional right to privacy such as California's, but a mediation privilege may nevertheless be recognized by statute or evidence rules or may be created by the courts as a matter of common law. In *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570 (E.D. Mo. 1991), for example -- a case discussed in the *Garstang* opinion -- the court created a privilege protecting communications in an informal mediation session held by an ombudsperson.

1.4.3.3. Issues regarding evidence. A 1996 U.S. Supreme Court case addresses another evidentiary privilege of particular importance to postsecondary institutions. In the case of *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996), the issue was "whether it is appropriate for federal courts to recognize a 'psychotherapist privilege' under Rule 501 of the Federal Rules of Evidence" and, more specifically, "whether statements . . . made to [a licensed clinical social worker] during . . . counseling sessions are protected from compelled disclosure in a federal civil action . . . ." The court answered both questions in the affirmative. Regarding the psychotherapist's privilege in general, the court reasoned that "[l]ike the spousal and attorney-client privileges, the psychotherapist-patient privilege is 'rooted in the imperative need for confidence and trust' (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980))." Such a privilege serves the important private interest of promoting development of the relationship between therapist and patient necessary for successful treatment, and the important public interest of "facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem." In addition, the court confirmed "that all 50 States and the District of Columbia have enacted into law some form of the psychotherapist privilege" and reasoned that "the existence of a consensus among the States . . . support[s] recognition of the privilege."

Regarding the second, more particular question, the Court determined that "[w]e have no hesitation in concluding in this case that the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy." According to the Court:

> The reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker . . . . Today, social workers provide a significant amount of mental health treatment . . . . Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist . . . , but whose counseling sessions serve the same public goals [116 S. Ct. at 1931].

While the Court's opinion in *Jaffee* gives strong support to a broad psychotherapist privilege, it is also important to note that this privilege, like others, is not absolute. In a concluding comment in *Jaffee*, the Court cautioned that "there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist (116 S. Ct. at 1932 n.19). For a famous and graphic illustration of this limit, see the *Tarasoff* case, discussed in LHE 3d, Section 2.4.1 (p. 129). For another helpful reminder of this limit, and an excellent overview of the implications of the *Jaffee* decision for postsecondary administrators, see Gary Pavela (ed.), "The Benefits and Limits of Confidentiality," in *Synfax Weekly Report*, pp. 500-501 (June 24, 1996).

* * * *

In *Ross v. Medical University of South Carolina*, 453 S.E.2d 880 (S.C. 1994), the South Carolina Supreme Court addressed the scope of the attorney-client privilege as it applies in college and university grievance proceedings. The state court's opinion rejecting the privilege claim and holding the university in contempt serves as fair warning to administrators and counsel to carefully define their roles and interrelationships in the grievance process context.

The plaintiff, Dr. Ross, had been terminated from his position as tenured professor and chairman of the radiology department at the Medical University of South Carolina ("MUSC"). He filed suit alleging various causes of action, including a claim under the state's administrative procedure act, that MUSC had denied him a fair hearing. The basis for this claim was several alleged procedural irregularities, especially: (1) that the vice president had acted as both prosecutor and judge during the grievance proceeding; and (2) that the vice president had had ex parte communications with MUSC's general counsel concerning the recommendation the faculty hearing committee had issued at the first step in the grievance process. The plaintiff sought information from MUSC about these alleged procedural irregularities, and the trial court found MUSC to be in contempt for not complying with the plaintiff's requests. The state Court of Appeals vacated the trial court's order and the state Supreme Court granted certiorari to determine if the information requested by the plaintiff was protected by the attorney-client privilege.

MUSC had a three-step faculty grievance process. At the first stage, the vice president referred the complaint to a Faculty Hearing Committee for a hearing and recommendation; at the second stage, the vice president reviewed the hearing record and made his own recommendation. No further action was taken on the matter if both recommendations were favorable to the faculty member. If the vice president's recommendation was unfavorable, the faculty member could, as a third step, appeal to the Board of Trustees. The plaintiff contended that, at step two, the vice president had conferred with the general counsel prior to his concurrence in the Faculty committee's recommendation to terminate, and that the general counsel prepared the written concurrence for the vice president. In attempting to support these charges of procedural irregularity, the plaintiff served Requests for Admissions which MUSC refused to answer, asserting that these alleged communications were covered by the attorney-client privilege and thus are not discoverable. In rejecting MUSC's privilege claim, the Court relied on Section 1-23-360 of the South Carolina Code, part of the state administrative procedure act:

> Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly in connection with any issue of fact, with any person or party, nor in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate.

The court determined: (1) that the vice president had acted as "an intermediate judge" during step two of the grievance process and was therefore "'assigned to render a decision'" in the case at hand, and (2) that the general counsel had "represented MUSC in prosecuting the case before the Faculty committee," and thus acted as a "representative" of a "party" rather than as personal counsel to the vice president. The ex parte communications between the vice president and general counsel were therefore in violation of Section 1-23-360, and the court refused to extend the attorney-client privilege to communications that violated a state law under which (as was the case with Section 1-23-360) the violator could be subject to criminal sanctions.

The court's reasoning seems broad enough to jeopardize privilege claims even if the state had not had an administrative procedure statute such as Section 1-23-360, and even if the defendant had been a private institution and thus not subject to such statutes (which usually cover only public institutions). The crux of this broader reasoning is that the vice president, in the particular circumstances of this case, was not a "client" of the general counsel and the general counsel was not an "attorney" for the vice president but rather for another "client" (the university itself). Thus the necessary preconditions for assertion of the privilege did not exist. As the court stated at the conclusion of its opinion:

> [The] General Counsel was acting in a representative capacity for MUSC, and not as counsel for [the] Vice President. [The] Vice President, acting in a judicial capacity in the administrative process, was not entitled to confer with General Counsel, who was acting as a prosecutor against Ross [453 S.E.2d at 884-885].

Sec. 1.5. The Public-Private Dichotomy

1.5.2. The state action doctrine. The U.S. Supreme Court has provided a reminder that courts do still sometimes determine that a "private" entity is actually a government actor. In *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), an individual who wished to display a political advertisement on a billboard owned by Amtrak challenged on First Amendment grounds the corporation's refusal to accept the advertisement. The Court ruled that the National Railroad Passenger Corporation (Amtrak), although nominally a private corporation, was created by Congress for the purpose of furthering governmental objectives and thus was a government actor. The President appoints six of the nine members of the board of directors, and the corporation is accountable to the government through reporting requirements. Given the purposes behind its creation and its accountability requirements, the Court ruled that Amtrak is "an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution." The case is important to higher education in two ways: (1) for public institutions that have or seek to create a captive or affiliated corporation (see LHE 3d, Section 2.2.5), the case illustrates that government cannot escape its obligations to respect individuals' constitutional rights "by simply resorting to the corporate form" (513 U.S. at 397); (2) for states seeking to restructure or add institutions to their state higher education systems (and for institutions subject to such restructuring or addition), the case suggests that the government contacts/symbiotic relationship theory (LHE 3d, pp. 48-49, 54) is likely to support a state action finding whenever government, by law, establishes an institution or entity to pursue "governmental objections under the direction and control of . . . governmental appointees" (513 U.S. at 398).

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The U.S. Court of Appeals for the Second Circuit has recently rejected two attempts by plaintiffs to assert constitutional claims against private actors. In the first case, *Leeds v. Meltz*, 85 F.3d 51 (2d Cir. 1996), a graduate of CUNY School of Law (a public university) sought to have an advertisement printed in the law school's newspaper. The student editors of the paper rejected the advertisement because they believed it could subject them to a defamation lawsuit. Leeds sued the student editors and the acting dean of the law school under Section 1983 (LHE 3d, Section 2.4.3), asserting that the rejection of his advertisement violated his free speech rights.

The trial court relied on *Rendell-Baker v. Kohn* (LHE 3d, pp. 51-52). First, noted the court, the student editors were not state actors. Furthermore, the law school exercised little or no control over the publication, meaning that no public employee supervised the activities of the editors. The court rejected Leeds' claim that, because the student paper was funded in part with mandatory student fees, the actions of the student editors were attributable either to the CUNY administration or to the state. The court granted the defendants' motion to dismiss, stating that the plaintiff's allegations failed to support any plausible inference of state action.

The appellate court affirmed, noting that the CUNY administration had issued a memo prior to the litigation disclaiming any right to control student publications, even those financed through student activity fees. And the plaintiff's allegations that certain CUNY employees "prevented" publication of his advertisement, without any evidence that this occurred, were insufficient to support a state action theory.

In the second case, *Logan v. Bennington College Corp.*, 72 F.3d 1017 (2d Cir. 1995), Professor Leroy Logan, a tenured professor of drama at this private college, was dismissed from his position after a college committee upheld a student's allegations of sexual harassment by Logan. The college had recently adopted a new sexual harassment policy and complaint procedure in response to a conciliation agreement stemming from an earlier, unrelated sexual harassment complaint against the college. In the prior case, the Vermont Human Rights Commission had found the previous version of the harassment policy ineffective. The new policy provided for a hearing before a committee comprised of faculty, staff, and one student.

Arguing that the new policy violated his due process rights, Logan asserted that the involvement of the Vermont Human Rights Commission in requiring the college to adopt a new harassment policy and complaint process rendered the college's actions in his hearing and subsequent dismissal "state action" for purposes of constitutional due process requirements. The court rejected Logan's state action argument, stating that the Human Rights Commission (HRC) played no role in the proceedings against Logan and that the harassment policy did not require the college to dismiss Logan. The policy provided for a variety of sanctions, one of which was dismissal. Only if the college had dismissed Logan because it believed that state law required it to do so would potential state action have occurred, according to the court. Even though the college changed its policy to comply with state law, "its action in terminating Logan was in no way dictated by state law or state actors" (72 F.3d at 1027). The court upheld the district court's grant of summary judgment for the college.

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A federal district court has ruled that Vanderbilt University's participation with the state government in experiments using radiation in the 1940s might constitute state action for purposes of a civil rights action against the university. In *Craft v. Vanderbilt University*, 940 F. Supp. 1185 (M.D. Tenn. 1996), the plaintiffs were individuals who, without their knowledge or consent, were involved in the radiation experiments. The experiments were conducted at a Vanderbilt clinic in conjunction with the Rockefeller Foundation and the Tennessee Department of Public Health. The plaintiffs alleged that the university and its co-defendants infringed their due process liberty interests by withholding information from the subjects of the experiment. The court used the "symbiotic relationship" test (LHE 3d, pp. 48-49), reasoning that a jury could find that the university's participation with the state in these experiments created a "symbiotic relationship" such that the university's actions could be regarded as state action. The project was funded by the state, and state officials were closely involved in approving research projects and making day-to-day management decisions. Therefore, summary judgment for the university was inappropriate, and trial would have to be held to determine whether Vanderbilt and the state were sufficiently "intertwined" with respect to the research project to hold Vanderbilt to constitutional standards under the state action doctrine.

Sec. 1.6. Religion and the Public-Private Dichotomy

The Religious Freedom Restoration Act of 1973 (RFRA), 42 U.S.C. §2000 *bb et seq.* (LHE 3d, pp. 58-59) has been invalidated by the U.S. Supreme Court. Congress had passed RFRA pursuant to its power under section 5 of the Fourteenth Amendment (see LHE 3d, Section 7.1.4) to enforce that amendment and the Bill of Rights against the states and their political subdivisions. In *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), the Court held that RFRA is beyond the scope of Congress' Fourteenth Amendment enforcement power. Although the Court addressed only RFRA's validity as it applies to the states, the statute by its express terms also applies to the federal government (§§ 2000 bb-2(1), 2000 bb-3(a)). Thus RFRA may technically still be presumed constitutional as to these latter applications. Were the issue to come to litigation, however, it is likely that the courts would also invalidate RFRA as it applies to the federal government. This is because the portions of the *Boerne* opinion that rely on *Marbury v. Madison* and judicial supremacy, concluding that "RFRA contradicts vital principles necessary to maintain separation of powers [between Congress and the Court] . . ." (117 S.Ct. at 2172), seem just as applicable to the federal government as to the states.

The invalidation of RFRA has serious consequences for the free exercise rights of both institutions and the members of their academic communities. The earlier case of *Employment Division v. Smith* (LHE 3d, p. 59) is now reinstituted as the controlling authority on the right to free exercise of religion. Whereas RFRA provided protection against generally applicable, religiously neutral laws that substantially burden religious practice, *Smith* provides no such protection. Thus religiously affiliated institutions no longer have federal religious freedom rights that guard them from general and neutral government regulations interfering with their religious mission. Moreover, individual students, faculty, and staff -- whether at religious institutions, private secular institutions, or public institutions -- no longer have federal religious freedom rights to guard them from general and neutral government regulations that interfere with their personal religious practices. And individuals at *public* institutions no longer have federal religious freedom rights to guard them from general and neutral *institutional* regulations that interfere with their personal religious practices.

There are at least three avenues that an individual religious adherent or a religiously affiliated institution might now pursue to reclaim some of the protection taken away first by *Smith* and then by *Boerne*. The first avenue is to seek maximum advantage from an important post-*Smith* case, *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993), that limits the impact of *Smith*. Under *Lukumi Babalu Aye*, challengers may look beyond the face of a regulation to discern its "object" from the background and context of its passage and enforcement. If this investigation reveals an object of "animosity" to religion or a particular religious practice, then the court will not view the regulation as religiously neutral and will, instead, subject the regulation to a strict "compelling interest" test (LHE 3d, p. 58).

The second avenue is to seek protection under some other clause of the federal Constitution. The best bet is probably the free speech and press clauses of the First Amendment, which cover religious activity that is expressive (communicative). The U.S. Supreme Court's decisions in *Widmar v. Vincent* (LHE 3d, Section 4.11.4) and *Rosenberger v. Rectors and Visitors of the University of Virginia* (this Supp., Sections 4.11.4 and 4.13.2) provide good examples of protecting religious activity under these clauses. Another possibility is the due process clauses of the Fifth and Fourteenth Amendments, which protect certain privacy interests. The *Smith* case itself includes a discussion of this due process protection for religious activity (494 U.S. at 881-882).

The third avenue is to look beyond the U.S. Constitution for some other source of law (see LHE 3d, Section 1.3) that protects religious freedom. Some state constitutions, for instance, may have protections that are stronger than what is now provided by the federal free exercise clause (see LHE 3d, Section 1.5.3). Similarly, federal and state statutes will sometimes protect religious freedom. The federal Title VII statute on employment discrimination, for example, protects religious institutions from federal government intrusions into some religiously based employment policies (LHE 3d, Section 7.2.6.2), and protects employees from intrusions by employers into some religious practices (LHE 3d, Section 3.3.7).

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In *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997), the United States Court of Appeals for the Seventh Circuit addressed the contentious issue of incorporating prayer into the commencement exercises of higher educational institutions. A law school professor, law students, and an undergraduate student brought suit challenging Indiana University's 155-year-old tradition of nonsectarian invocations and benedictions during commencement. The plaintiffs claimed that such a use of prayer, nonsectarian or not, violated the First Amendment's establishment clause and was equivalent to state endorsement of religion. The court disagreed:

> [T]he University's practice of having an invocation and benediction at its commencements has prevailed for 155 years and is widespread throughout the nation. Rather than being a violation of the Establishment Clause, it is "simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh v. Chambers*, 463 U.S. 783, 792 (1983). As we held in *Sherman v. Community Consolidated School District* 21, 980 F.2d 437 (7th Cir. 1992), Illinois public schools may lead the Pledge of Allegiance, including its reference to God, without violating the Establishment Clause of the First Amendment. Similarly here, the invocation and benediction serve legitimate secular purposes of solemnizing public occasions rather than approving particular religious beliefs (*Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring)). Finally, as the district court correctly determined, the University's inclusion of a brief non-sectarian invocation and benediction does not have a primary effect of endorsing or disapproving religion, and there is no excessive entanglement of church and state by virtue of the University's selection of a cleric or its instruction to the cleric that his or her remarks should be unifying and uplifting. Insofar as there is any advancement of religion or governmental entanglement, it is de minimis at

> best. *See Metzl v. Leininger*, 57 F.3d 618, 620 (7th Cir. 1995) [104 F.3d at 986].

The plaintiffs also argued that the invocation and benediction violated the establishment clause because they were coercive (see *Lee v. Weisman*, 505 U.S. 577 (1992)). The court disagreed, failing to recognize any coercion. According to the court, nearly 2,500 of the 7,400 graduating students voluntarily elected not to attend commencement; those that did attend were free to exit before both the invocation and benediction, and return after each was completed; and those choosing not to exit were free to sit, as did most in attendance, during both ceremonies. These factors significantly undermined the suggestion that those attending graduation were coerced into participating in the nonsectarian invocation and benediction.

Selected Annotated Bibliography

Sec. 1.1 (How Far Does the Law Reach and How Loud Does it Speak?)

Olivas, Michael A. *The Law and Higher Education: Cases and Materials on Colleges in Court*. (Carolina Academic Press, 2nd ed., 1997). A casebook presenting both foundational and contemporary case law on major themes in higher education law and governance. Includes supportive commentary by the author, news accounts, and excerpts from and cites to writings of others. [This is the second edition of the volume listed in the bibliography for Section 1.1 of LHE 3d.]

The Chronicle of Higher Education, "Academe Today." A valuable on-line research service. Access to this web site via www.chronicle.com is available only by access codes provided to subscribers on request. This site allows access to *The Chronicle*'s latest news stories concerning actions in Congress, the Executive Branch, and the courts as well as other developments in higher education, along with background material such as the full text of court opinions. *The Chronicle* has also archived its past publications allowing for easy access to past articles, cases, and citations.

Sec. 1.2 (Evolution of the Law Relating to Postsecondary Education)

Johnson, Sandra L. and Rush, Sean C. *Reinventing the University: Managing and Financing Institutions of Higher Education*. Colorado Springs: John Wiley & Sons, 1995. Discusses the application of "re-engineering" techniques to higher education, with emphasis on reducing expenditures.

Levine, Arthur, ed.. *Higher Learning in America, 1980-2000*. Baltimore: Johns Hopkins University Press, 1994. Examines the political, economic and demographic shifts that are affecting higher education. A variety of issues critical to various sectors of postsecondary education (research universities, community colleges, and liberal arts colleges) are discussed.

Sec. 1.3 (Sources of Postsecondary Education Law)

Sorenson, Gail, & Andrew S. LaManque. "The Application of *Hazelwood v. Kuhlmeier* in College Litigation," 22 *J. Coll. & Univ. Law* 971 (1996). Addresses the effect of the "cross application of judicial standards" from secondary to postsecondary settings and the detrimental effect this practice may have in cases involving collegiate classrooms. Suggests that minimizing salient differences between K-12 and postsecondary education settings is potentially a threat to the delicate academic freedom concerns at the postsecondary level.

Sec. 1.4 (Litigation in the Courts)

Epstein, Edna S. *The Attorney-Client Privilege and the Work-Product Doctrine* (3d ed., American Bar Association, Section of Litigation, 1996). A comprehensive overview of the law which provides practical tips and guidance through numerous case illustrations and contextual examples. Topics include the scope and elements of the attorney-client and work-product protections, waivers to and exceptions to these protections, choice of law issues, and ethical considerations. Primarily for attorneys.

Sec. 1.7 (Organizing the Postsecondary Institution's Legal Affairs)

National Association of College and University Attorneys. *The Formbook* (2d ed. 1994) [already listed at LHE 3d, p. 75] now comes with software available in a variety of formats. The *Formbook* was edited by Peter C. Wolk.

II

The College, Trustees, Administrators, and Staff

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Sec. 2.2. Sources and Scope of Authority

2.2.5. Captive and affiliated organizations. Captive and affiliated organizations. A decision by New York State's highest court provides another illustration of the application of freedom of information and public records laws to affiliated organizations. The plaintiff in *Encore College Bookstores, Inc. v. Auxiliary Services Corp. of State University of New York at Farmingdale*, 663 N.E.2d 302 (N.Y. 1995), was a private bookstore operating near the Farmingdale Campus. Using the state's Freedom of Information Law (FOIL) (McKinney N.Y. Pub. Off. Law §87), Encore sought to require the Auxiliary Service Corporation (ASC) of the State University of New York (SUNY) at Farmingdale to disclose a booklist that its subcontractor had compiled in the course of its responsibilities for operating the campus bookstore and maintaining the inventory of textbooks necessary for the academic year. SUNY created ASC to provide auxiliary services for the college community. ASC elected to discharge the responsibility for maintaining the campus bookstore to a private subcontractor. Like the courts in the *Weston* and *Nicholls* cases (LHE 3d, pp. 96-97), the court determined that the booklist was a "record" clearly within the ambit of FOIL. Even though these records were kept by ASC rather than SUNY, ASC nevertheless ran the bookstore and kept the records "on SUNY's behalf" and "for the benefit of SUNY." Moreover, to classify the booklist as something other than a record, simply because it was compiled by a subcontractor and held by an auxiliary corporation, would undermine the intent of FOIL and allow government agencies to insulate records by delegating their creation and maintenance to nongovernmental entities (663 N.E.2d at 306). Unlike *Weston* and *Nicholls*, however, the court did not order release of the records, but held instead that they fell within one of the Act's exemptions covering disclosures that would create a risk of "substantial competitive harm." According to the court, this "substantial competitive harm" could be inferred from the obvious commercial value of the booklist to Encore and the likelihood of competitive disadvantage its disclosure would create for the subcontractor operating the campus bookstore.

Sec. 2.3. Institutional Liability for Acts of Others

2.3.1. Institutional tort liability.

2.3.1.1. Negligence. A Louisiana case provides an interesting contrast to the Delaware Supreme Court's opinion in *Furek* (LHE 3d, pp. 105-106). In *Pitre v. Louisiana Tech University*, 655 So.2d 659 (La. Ct. App. 1995), *rev'd*, 673 So. 2d 585 (La. 1996), *cert. denied*, 117 S. Ct. 509 (1996), the intermediate appellate court had found the university liable for injuries to a student who was paralyzed during a sledding accident. When a rare snowstorm blanketed the university's campus, the administration issued a written warning to its students, placed on each student's bed, urging them to use good judgment and to avoid sledding in dangerous areas. Pitre and two classmates used a trash can lid as a sled, rode down a long hill, and Pitre struck the base of a light pole in a university parking lot. The appellate court ruled that the university had a duty to prevent unreasonably unsafe student activities, and viewed the written warning as an encouragement to engage in sledding. Although the court acknowledged that Pitre's own behavior contributed to his injuries, it found the university twenty-five percent liable.

The Supreme Court of Louisiana reversed, reasoning that the danger encountered by Pitre and his friends was obvious to a reasonably careful invitee. The court stated that, since sledding is not inherently dangerous, the university could not foresee that Pitre would select a location unsuitable for sledding; furthermore, said the court, it was reasonable for the university to install light poles as a safety mechanism. The court ruled that the university bore no liability for the plaintiff's injuries.

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Parking garages provided a source of liability for universities in two cases. In *Malley v. Youngstown State University*, 658 N.E.2d 333 (Ohio Ct. Cl. 1995), a student fell into a hole in the garage floor. In *Zuckerman v. State*, 618 N.Y.S. 2d 917 (N.Y. App. Div. 1994), a student slipped on a patch of ice on the upper deck of the garage and fell. In both cases, the courts held that the university had a duty to inspect the property, and imputed constructive knowledge of the danger to the landlord-university.

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The Supreme Court of Kansas has ruled that Witchita State University was not liable for the death of an invitee who was shot by a gang member after a fireworks celebration on campus. In *Gragg v. Wichita State University*, 934 P.2d 121 (Kan. 1997), the children of Ms. Gragg claimed that the university and several corporate sponsors of the fireworks program failed to provide adequate security, that the lighting was inadequate, and that the defendants had failed to warn the victim that there had been criminal incidents near the WSU campus. The court ruled that the university and other defendants did not owe Ms. Gragg a legal duty to protect her from the criminal act of a third party. Since the WSU police did not know that the assailant was on campus, or that he intended to shoot a rival gang member, the shooting was not foreseeable. The court distinguished *Nero* (LHE 3d, pp. 104-105) because, in *Nero*, the university was aware of the assailant's previous criminal record. No such knowledge was present in this case. Furthermore, similar celebrations had been held on campus for the prior seventeen years; no shootings or other violent crime had taken place.

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Outreach programs initiated by colleges may involve litigation over the college's supervision of its own students, or of invitees to the campus (such as high school students enrolled in pre-college programs). Colleges may also face liability for injuries to their students off-campus--whether engaged in an internship, a study abroad program, or a sports or recreational activity.

A case against the State University of New York at Binghamton is instructive. In *Carol "WW" v. Stala*, 627 N.Y.S. 2d 136 (N.Y. App. Div. 1995), a mother alleged that a university student, participating in a "Big Buddy" program sponsored by the student association, had sexually assaulted her children. These children were not participants in the program, but had encountered the student while he was in the neighborhood because of the Big Buddy program. Although the court ruled that the program sponsors had a duty to supervise program participants and to provide for the safety of the children participating in the program, that duty did not extend to other children who were not program participants.

Another case illustrative of the college's potential liability when minors are involved in campus programs is *Dismuke v. Quaynor*, 637 So. 2d 555 (La. App. 1994), *review denied*, 639 So.2d 1164 (La. 1994). Dismuke, a 15-year old, was a participant in a summer camp sponsored by Grambling State University. The university hired college students as counselors. Quaynor, a Grambling student and counselor, raped Dismuke in the student union building after the campers had been dismissed early because of inclement weather. The court found that the university had been negligent in its selection of staff and that its staff had not been trained properly.

Even if the college uses an off-campus site owned and managed by another entity, it may still face liability for injuries to students enrolled in classes offered at that site. For example, in *Delbridge v. Maricopa County Community College District*, 893 P.2d 55 (Ariz. App. Div. 1 1994), the college had offered an in-house training program to employees of the Salt River Project (SRP) at SRP's own site. Although SRP provided instructors for the program, they were considered adjunct instructors of the college, and they were paid by the college. Participants in the training program were considered students of the college. Delbridge was enrolled in a course in Plant Mechanics, a portion of which required students to learn how to climb utility poles. During a class session, Delbridge climbed a pole to a height of thirty feet, lost his grip, and fell, resulting in paralysis. Delbridge brought an action in tort against the college, asserting that the college had a duty to provide a reasonably safe class environment and to protect him from unreasonable risks of harm.

Although the trial court had awarded summary judgment to the college, the appellate court reversed, stating that "the teacher-student relationship is a special one, affording the student protection from unreasonable risks of harm" (893 P.2d at 58). The court noted that the college had control over the classroom through its contract with SRP, despite the fact that the premises were also under the control of SRP. Citing *Bradshaw* and its progeny (LHE 3d, pp. 107-109), the college argued that it had no *in loco parentis* responsibilities toward its students and that it could not be liable for off-campus injuries. The court disagreed:

> The issue here . . . concerns a school district's duty to provide a safe *in-class* environment for its students. We do not accept [the college's] contention that the SRP lineman training class was not held on [college] premises. The record demonstrates that the facilities at which [the college] holds its classes become the [college] "campus." Even if we accept that the class was hold off-campus, Delbridge was injured nonetheless while performing an exercise which was both supervised by the instructor and included in the curriculum [893 P.2d at 59].

Having found that a duty existed not to expose the plaintiff to an unreasonable risk of harm, the court remanded for a trial on the issue of whether the college breached its duty to Delbridge.

For a brief review of potential liability related to internship programs, *see* Lori Chamberlain, "The Perils of Internship Programs," 26 *College Law Digest* 171-174 (January 25, 1996).

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Most students attempting to state claims for educational malpractice have found the same judicial hostility exhibited in *Ross v. Creighton University* (LHE 3d, p. 113). A Colorado appellate court relied on *Ross* to reject the educational malpractice claims of nineteen students against defendant in *Tolman v. CenCor Career Colleges, Inc.*, 851 P.2d 203 (Colo. App. Ct. 1992), *aff'd*, 868 P.2d 396 (Col. 1994), stating that "there is no workable standard of care here and defendant would face an undue burden if forced to litigate its selection of curriculum and teaching methods" (851 P.2d at 205). As did the appellate court in *Ross*, however, the Colorado court refused to dismiss the plaintiffs' contract claims against the college, ruling that if plaintiffs could prove that the college breached an express warranty to the students, or reliance on misrepresentations by college personnel, their contract claims might succeed.

Although a municipal court -- the City Court of Yonkers, New York-- has afforded plaintiffs relief under an educational malpractice theory, that result was reversed in appeal. In *Andre v. Pace University*, 618 N.Y.S. 2d 975 (City Ct. Yonkers 1994), *reversed*, 655 N.Y.S. 2d 777 (N.Y. App. Div. 1996), the plaintiffs sought assistance from Small Claims Court, asserting contract and tort claims stemming from their dissatisfaction with a computer programming course offered by Pace University. The plaintiffs asserted that the course instructor selected an unsuitable text (breach of contract), that the course description was false and misleading (contract rescission), that the wrong advice given the plaintiffs by the department chair constituted a breach of fiduciary duty, that the selection of an unqualified instructor was educational malpractice, and several other claims. The court found the university liable on the breach of contract, breach of fiduciary duty, and educational malpractice (negligence) claims, as well as finding a violation of the New York law prohibiting deceptive business practices. With respect to the malpractice claim, the court found that the professor's selection of an inappropriate text and her refusal to teach the course at a beginning level (as both the catalog and the department chair had promised) constituted sufficient evidence of proximate cause for the students' inability to learn anything from the course. Compensatory damages were awarded in the amount of $1,000 for each of the two plaintiffs; finding the university's behavior "morally culpable," the court awarded each plaintiff $1,000 in punitive damages as well.

On appeal, however, in *Andre v. Pace University*, 655 N.Y.S.2d 777 (N.Y. App. Div. 1996), the state appeals court reversed, rejecting every ruling of the municipal court. It noted that "the courts of this State have consistently declined to entertain actions sounding in 'educational malpractice,' although quite possibly cognizable under traditional notions of tort law, as a matter of public policy" (655 N.Y.S.2d at 779). Furthermore, said the appellate court, the breach of contract would require the court to insert itself into educational judgments about the quality of the texts, the effectiveness of the instructor's pedagogical method, and other matters "best left to the educational community" (655 N.Y.S.2d at 898).

Similarly, a New York appellate court rejected the claim of a student that Columbia University failed to provide the promised quality of educational environment and had made false representations concerning the university's disciplinary process (*Sirohi v. Lee*, 634 N.Y.S.2d 119 (N.Y. App. Div. 1995)).

Despite their near universal lack of success, students are still attempting to state educational malpractice claims. Heather May, "Ex-Students Sue Universities Over Quality of Education," *The Chronicle of Higher Education*, August 16, 1996, A29, 32.

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For a comprehensive analysis of tort claims against colleges and universities litigated in 1995, see Robert D. Bickel, "Tort Accident Cases Involving Colleges and Universities: A Review of the 1995 Judicial Decisions," 23 *J. of College and Univ. Law* 355 (1997).

2.3.2. Institutional contract liability. A recent U.S. Supreme Court case demonstrates that sovereign immunity from contract liability (LHE 3d, pp. 114-115) will occasionally also be available to public institutions under federal (rather than state) law. In *Regents of the University of California v. Doe* (this Supp., Section 2.3.3), the Court upheld the university's assertion of Eleventh Amendment immunity (see LHE 3d, Section 2.3.3 (pp. 118-119)) as a defense to a federal court breach of contract suit brought by a disappointed applicant for employment. Such a federal immunity claim applies only in those limited circumstances in which a federal district court could obtain jurisdiction over a breach of contract claim (see LHE 3d, Section 1.4.2.1).

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In a case involving both apparent authority and ratification doctrines (see LHE 3d, pp. 115-117), the Supreme Court of Massachusetts ruled that Boston University must pay a technical training company more than $5.7 million for its "willful and knowing" breach of contract (*Linkage Corporation v. Trustees of Boston University*, 679 N.E.2d 191 (Mass. 1997). (The facts of the case are discussed in this Supplement, section 9.2.2). One important issue in the case was whether an earlier contract between Boston University and Linkage for the provision of educational services by Linkage had been renewed; Linkage asserted that it had, while the University stated that the contract had not been renewed, but had been lawfully terminated. A jury had found that the University's vice president for external programs had apparent authority to enter a renewal contract with Linkage, and also found that the University had ratified that agreement.

With respect to the apparent authority issue, the court noted that the vice president had "virtual autonomy" in supervising the relationship between Linkage and the University. He had been the University's representative in the negotiation of the earlier contract, and was named in the contractual documents as the University's primary representative for all legal notices. Boston University argued that the vice president lacked authority to enter the agreement because, at the same time that negotiations for the contract renewal were taking place, the University had issued a directive that required all payments greater than $5,000 to be authorized by the senior vice president. The court, however, ruled that because of the vice president's direct access to the president, and because the contractual relationship predated the directive, it was reasonable for Linkage's president to conclude that the directive would not be enforced with respect to its contract with the University.

With respect to the ratification issue, the court agreed with the jury that the conduct of University officials subsequent to the execution of the renewal contract supported the ratification argument. The vice president had asked his superiors, in writing, if additional review was necessary after he executed the renewal contract. Neither the senior vice president nor the president advised Linkage's president or their own vice president that they did not approve of the renewal contract. Characterizing the conduct of University officials as "informed acquiescence," the court endorsed the jury's finding that the University had ratified the agreement.

Although the behavior of University officials was sufficient to establish ratification, the court added that, because the University benefitted financially from the execution of the renewal contract, this benefit was additional evidence of its ratification of the agreement.

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A Missouri appellate court addressed the issue of apparent authority in *Earl v. St. Louis University*, 875 S.W.2d 234 (Mo. App. E.D. 1994). When Mr. Earl, the former chief financial officer for the St. Louis University Hospital, negotiated a severance agreement with the chief administrative officer of the hospital, he modeled his agreement on an agreement that that officer had negotiated with an employee who had left the hospital prior to Mr. Earl. After Earl and the hospital official had signed the agreement, it was sent to the president of the University, who stated that the agreement was unacceptable. Earl sought judicial enforcement of the agreement, claiming that the hospital official had apparent authority to bind the University because that individual had negotiated other severance agreements. In addition, the court ruled that, because of Earl's position, he was aware of the earlier agreements because he was required to make the payments specified by these agreements. Given the prior agreements and Earl's job responsibilities, said the court, it was reasonable for Earl to believe that the hospital official had the apparent authority to enter a similar agreement with him.

2.3.3. Institutional liabilities for violations of federal constitutional rights. A recent U.S. Supreme Court case adds an important clarification of Eleventh Amendment immunity analysis in situations where a third party has agreed to indemnify the state agency from liability. In *Regents of the University of California v. Doe*, 117 S. Ct. 900 (1997), the plaintiff, Doe, sued the university for breach of an agreement to employ him at the Livermore National Laboratory. The university operated the laboratory under a contract with the federal government. Because the contract provided that the federal government (and not the state) would assume liability for any money damages judgment against the university arising from its performance of the contract, the plaintiff argued that any judgment in his favor would not come from the state treasury and therefore the university was not immune from suit. The Court agreed with the general proposition that "the question of whether a money judgment against a state instrumentality or official would be enforceable against the State is of considerable importance to any evaluation of the relationship between the State and the entity or individual being sued" (117 S. Ct. at 904; see LHE 3d at 122-123). But the Court rejected the specific proposition that "the presence or absence of a third party's undertaking to indemnify the agency should determine whether it is the kind of entity that should be treated as an arm of the state" (117 S. Ct. at

904). The relevant inquiry, according to the Court, was whether the state was potentially liable for money judgments against the university, not whether the state would be able to shift its liability to a third party in the particular case at hand. Since the state did have potential liability for university money judgments, and since the university otherwise qualified as an "arm of the state" (see LHE 3d at 119), the university had an Eleventh Amendment immunity from the plaintiff's suit.

* * * * *

A 1996 case from the U.S. Court of Appeals for the Eighth Circuit addresses the status of community colleges under the Eleventh Amendment and Section 1983. This 2-1 split decision in *Hadley v. North Arkansas Community Technical College*, 76 F.3d 1437 (8th Cir. 1996), should be compared with the *Hander* and *Goss* cases concerning Texas junior colleges (LHE 3d, p. 121). The case also flags some unresolved issues concerning Eleventh Amendment immunities for community colleges and, for state institutions as well as community colleges, emphasizes the important role played by fiscal factors such as those relied on in *Urbano*, *Hall*, and *Kovats* (LHE 3d, pp. 122-123) in determining an institution's Eleventh Amendment status.

In *Hadley*, a vocational instructor filed a Section 1983 claim in federal court, alleging that the defendant's decision to terminate him violated his due process rights. The issue before the court was whether North Arkansas Community Technical College (NACTC) should be classified as an arm of the state entitled to Eleventh Amendment immunity from damages, or a state political subdivision or municipal corporation which is not immune. According to the court:

> State universities and colleges almost always enjoy Eleventh Amendment immunity. On the other hand, community and technical colleges often have deep roots in a local community. When those roots include local political and financial involvement, the resulting Eleventh Amendment immunity questions tend to be difficult and very fact specific (citing cases) [76 F.3d at 1438-39].

Examining the structure and authority of NACTC under state law, the court determined "that NACTC is, both financially and institutionally, an arm of the State, and that any damage award to Hadley [the instructor] would inevitably be paid from the state treasury." Weighed against these factors, however, is the contrasting consideration that "Arkansas community colleges also have elements of local funding and control" suggestive of a political subdivision. The court considered the former factors to prevail over the latter because "exposure of the state treasury is a more important factor than whether the State controls the entity in question" (citing *Hess v. Port Authority Trans-Hudson Corp.*, 115 S.Ct. 394 (1994)). Thus, despite the fact that NACTC's daily operations were largely controlled by locally elected officials of a community college district, the district had residual authority to supplement NACTC's operating budget with local tax revenues, and the district had the responsibility for funding capital improvements from local tax revenues, NACTC nevertheless remained financially dependent upon the state for its daily operations and should therefore be afforded immunity:

> Read together, the provisions delimiting the responsibility of the State and Local Boards reveal a community college system that blends state and local interests and authorities. The local control is of course relevant but falls short, in our view, of making NACTC the Eleventh Amendment equivalent of a political subdivision . . . . Here, Arkansas calls NACTC a state agency, allows for substantial local autonomy but provides ultimate state control, and -- most importantly -- funds the agency's general operations primarily from the state treasury [76 F.3d at 1442].

In making this determination the court dismissed the plaintiff's argument that the nominal sum he was seeking in damages could be entirely paid by NACTC's federal, tuition, and private revenues or by future local tax increases, stating that "the nature of the entity, not the nature of the relief," was to be the determinative factor.

The dissenting judge strongly disagreed with the majority's characterization of the NACTC's authority and discretion under state law. According to the dissent, the community college district was more like a local school district which, under the U.S. Supreme Court's ruling in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), would not have Eleventh Amendment immunity. In addition, the dissent argued, "[a]lthough NACTC receives the majority of its funding from the state, a judgment in Hadley's favor need not implicate the state treasury. The college may levy additional millage or apply tuition moneys designated 'educational' to satisfy the award" (which would be in the nature of backpay for the instructor).

Section 2.5. Institutional Management of Liability Risk

2.5.2. Risk transfer.

2.5.2.3. Releases and waivers. The recent case of *Kryiazis v. University of West Virginia*, discussed in this Supplement, Section 2.5.4, provides another instructive example of releases and the legal limits on their use.

2.5.4. Legal limits on authority to transfer risk. In *Kyriazis v. University of West Virginia*, 450 S.E.2d 649 (W.Va. 1994), the West Virginia Supreme Court of Appeals invalidated an "anticipatory release" that the university required students to sign before playing rugby, a club sport. The court relied heavily on the *Tunkl* case (LHE 3d, pp. 141-142), which the court called "the leading case on the issue whether an anticipatory release violates public policy under the 'public service' exception." The court's opinion provides useful explication of criteria 2, 4, and 5 from *Tunkl*. Applying criterion 2 (450 S.E.2d at 654-655), the court determined that "[w]hen a state university provides recreational activities to its students, it fulfills its educational mission, and performs a public service. As an enterprise charged with a duty of public service here, the University owes a duty of due care to its students when it encourages them to participate in any sport." Applying criteria 4 and 5 (450 S.E.2d at 655), the court examined whether the release was "an agreement that was freely and fairly made between parties who are in an equal bargaining position" and determined that it was not. The court therefore concluded that "[b]ecause . . . the University qualifies as a 'public service,' and [because] it possessed a decisive bargaining advantage over the [student] when he executed the Release, we find the anticipatory Release void as a matter of West Virginia public policy."[1]

In an important postscript (450 S.E.2d at 658), the court also noted that, for a release to be valid, the person signing the document must "voluntarily [expose] himself to the danger with full knowledge and appreciation of its existence." Since the student asserted that he had no previous experience with the sport and had signed the release before "participating in a scrimmage" or observing a match, and that "the risks of injury were not explained to him," it was not clear whether he "fully appreciated the attendant risks of club rugby." Such issues apparently supplement the issues that arise from the *Tunkl* factors and, according to the court, are issues of fact to be determined by a jury. Such issues also parallel the "assumption of risk" issues that may arise in the litigation of student athletic injury claims; for an example, also involving rugby, see the *Regan* case in this Supplement, Section 4.15.6.

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[1] In another portion of its opinion (450 S.E.2d at 655-657), the court also held that the release "violates the equal protection guarantee under the West Virginia Constitution" because the university required club sports participants to sign the release but did not require intramural sports participants to do the same.

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Sec. 2.3 (Institutional Liability for Acts of Others)

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III

The College and the Faculty

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Sec. 3.3. Nondiscrimination in Employment

3.3.2. The legal concept of discrimination.

3.3.2.1. Title VII of the Civil Rights Act of 1964. The provision of the Civil Rights Act of 1991 (which amended Title VII) that permits the award of compensatory and punitive damages (see LHE 3d p. 200) was tested in a case brought against Metropolitan State University. In *Thornton v. Kaplan*, 958 F. Supp. 502 (D. Colo. 1996), a jury had found that the University had discriminated against the plaintiff when it denied him tenure, and had awarded him $250,000 in compensatory damages, plus attorneys fees and court costs. The University argued that the award was excessive and moved for remittur (a request that the judge reduce the damage award) to

$50,000. The judge refused, citing evidence that the denial of tenure resulted in a "loss of enjoyment" that the plaintiff derived from teaching, a loss of income, diminished prospects for future employment, his humiliation, stress, depression, and feelings of exclusion from the academic community. Calling these losses "significant," the judge refused to reduce the damage award.

3.3.2.3. Title IX. Although the U.S. Supreme Court has ruled that Title IX prohibits sex discrimination in employment (see *North Haven Board of Education v. Bell*, LHE 3d, pp. 218, 832), several courts have ruled that if an employee seeks damages for employment discrimination, he or she must use Title VII rather than Title IX. For example, in *Cooper v. Gustavus Adolphus College*, 957 F. Supp. 191 (D. Minn. 1997), a male faculty member who was dismissed after being found guilty of sexually harassing a student claimed that the flawed dismissal procedure violated Title IX; he did not bring discrimination claims under Title VII. The court noted that, although students and prospective students may bring claims for damages under Title IX, most courts have ruled that an employee who asserts a sex discrimination claim must use Title VII because Title VII "provides a comprehensive and carefully balanced remedial mechanism for redressing employment discrimination, and since Title IX does not clearly imply a private cause of action for damages for employment discrimination, none should be created by the courts" (957 F. Supp. at 193).

The court rejected the plaintiff's claim that Title IX created an independent right to due process in the procedure used to determine whether an employee should be disciplined or terminated. Citing *Yusuf v. Vassar*

College (this Supp., Section 4.8.4), the court stated: "there is no Title IX statutory due process right separate from a right to be free from discrimination, even for a student. This must be all the more true for an employee, whose action for damages for discrimination must be found in Title VII, not Title IX" (957 F. Supp. at 194).

3.3.2.5. The Americans With Disabilities Act and the Rehabilitation Act of 1973. The Equal Employment Opportunity Commission has issued "Enforcement Guidance on the Americans With Disabilities Act and Psychiatric Disabilities" (March 25, 1997). The Guidelines describe the type of psychiatric disorders that may be protected by the ADA, discuss the circumstances under which an employer may seek information from an individual about a possible psychiatric disability, discuss the application of "reasonable accommodation" to psychiatric disabilities, examine the relationship between workplace misconduct and psychiatric disabilities, and review the "direct threat" standard in the context of psychiatric disabilities. For a discussion of employers' obligations under the ADA to employees with psychiatric disorders, see Barbara A. Lee and Peter H. Ruger, *Accommodating Faculty and Staff with Psychiatric Disorders* (National Association of College and University Attorneys, 1997).

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A federal trial court has rejected the University of Minnesota's argument that the decision of the U.S. Supreme Court in *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996) (discussed in this Supp., Section 7.1) exempts state institutions from complying with the ADA and the

Rehabilitation Act. In *Mayer v. University of Minnesota*, 940 F. Supp. 1474 (D.Minn. 1996), the court pointed to language in the Rehabilitation Act specifically abrogating Eleventh Amendment immunity for suits under Section 504 of the Rehabilitation Act (29 U.S.C. sec. 794); the ADA contains similar language (42 U.S.C. sec. 12202). The court also ruled that Congress enacted the ADA under the authority of the Fourteenth Amendment, making it a valid exercise of Congressional authority and therefore unavailable for the application of the *Seminole* precedent.

3.3.2.6. Age Discrimination in Employment Act (ADEA). The decision of the U.S. Supreme Court in *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996) (discussed in this Supp., Section 7.1) has provided a potential defense to public institutions whose former employees challenge their terminations on the grounds of alleged age discrimination. For example, in *Hurd v. Pittsburgh State University*, 109 F.3d 1540 (10th Cir. 1997), the plaintiff alleged an ADEA violation in his termination. At trial, a jury found in favor of the University. Hurd moved for a new trial, challenging the defendant's peremptory challenge to a potential juror on the grounds of race. While the appeal was pending, the U.S. Supreme Court announced its decision in *Seminole*. Since the defendant University had previously argued that the ADEA did not apply to employers who were protected by Eleventh Amendment immunity (but had lost below on this argument), the appellate court permitted the parties to add this issue to Mr. Hurd's appeal.

The appellate court noted that *Seminole* created a two-part test for determining whether Congress could abrogate state sovereign immunity when it enacted legislation. First, the court must determine whether Congress has "unequivocally expressed its intent to abrogate" immunity. Second, the court must decide whether Congress had the power to abrogate immunity--in other words, the court must determine which portion of the U.S. Constitution gives Congress the power to enact the law that is being challenged.

The court in *Hurd* first determined whether Congress had expressed its intent in the ADEA to abrogate immunity. It looked to amendments to the Fair Labor Standards Act in 1971 that specifically authorized federal lawsuits against states as employers under the ADEA. Furthermore, the U.S. Supreme Court had found, in an earlier case (*EEOC v. Wyoming*, 460 U.S. 226 (1983)), that the state employees were specifically covered by the ADEA. The court next turned to the issue of which clause of the Constitution provided the authority for Congress to enact the ADEA. In *Seminole*, the Court ruled that laws enacted under the authority of the Interstate Commerce Clause could not abrogate a state's sovereign immunity. But the Court did not address whether the Fourteenth Amendment provided the authority for Congress to abrogate state sovereign immunity. In *Hurd*, the court noted that all of the circuit courts that had addressed the same issue had concluded that the ADEA was enacted pursuant to the Fourteenth Amendment. And since *Seminole* had not addressed the issue of whether the Fourteenth Amendment provided Congress with the power to abrogate state sovereign immunity, this appellate court determined that precedent and the consistency of purposes of both the Fourteenth Amendment and the ADEA provided ample justification for applying the ADEA to the states.

The federal district courts to date are split on whether *Seminole* provides justification for absolving public colleges of the obligation to comply with the ADEA. For example, in *Hodgson v. University of Texas Medical Branch at Galveston*, 953 F. Supp. 168 (S.D. Tex. 1997), the court could find no Fifth Circuit or U.S. Supreme Court precedent on the issue of whether the ADEA was enacted under the authority of the Fourteenth Amendment. It thus determined that it should find the law constitutional, in the absence of precedent to the contrary. On the other hand, in *Humenansky v. Board of Regents of the University of Minnesota*, 73 Empl. Prac. Cas. 1004 (D. Minn. 1997), that court determined that the ADEA had been enacted under the Commerce Clause, and thus, under *Seminole* precedent, could not abrogate a state entity's sovereign immunity. Until the U.S. Supreme Court speaks on this issue, it is likely that public colleges in other circuits will attempt this defense to ADEA claims, as well as to other federal civil rights claims.

3.3.3. Race and national origin discrimination. In *Harrington v. Harris*, 118 F.3d 359 (5th Cir. 1997), a federal appellate court upheld a jury's finding that the law school's associate dean at Texas Southern University, a historically black institution, discriminated against three white law professors in determining their salaries over a period of several years. Using African-American faculty of the same seniority and rank as comparators, a magistrate judge had determined that the approximately $4,000 gap in salaries between the white and African-American faculty was due to race discrimination. But the appellate court overruled the jury's finding that the lower raises had also been the result of retaliation for the professors' criticism of the dean, stating that the denial of deserved merit pay increases did not constitute an "adverse employment action" and, thus, the professors had not sustained a constitutional deprivation under Section 1983 (see LHE 3d, Section 2.3.3).

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A federal appellate court ruling in a tenure denial case demonstrates the influence of the U.S. Supreme Court's decision in *St. Mary's Honor Center v. Hicks* (LHE 3d, pp. 202-203). The plaintiff in *Jiminez v. Mary Washington College*, 57 F.3d 369 (4th Cir. 1995), was a native of Trinidad and an African-American, who had been told at the time he was hired as an assistant professor of economics that he would have to complete his Ph.D. by the time of his tenure evaluation five years hence. His student course evaluations were consistently the lowest in the department, and he was advised annually that he needed to improve his teaching. At the time of the tenure decision, Jiminez had defended his dissertation (but had not yet been awarded the degree), and his teaching had improved dramatically. Nevertheless, his departmental colleagues recommended a terminal contract. The president concurred, but offered Jiminez the opportunity to reapply for his position when he had completed his degree, had improved his teaching to the satisfaction of both peers and students, and had presented a paper at an economics conference. A lawsuit alleging race and national origin discrimination ensued, and the trial court ruled in Jiminez's favor because (1) student course evaluations on which the college relied were tainted by racism, and (2) a white professor without a Ph.D. had been granted tenure several years earlier.

The appellate court reversed the trial court's ruling. Under the *Hicks* doctrine, the court stated, Jiminez must demonstrate two things: that the college's reason for denying him tenure was false, and that the real reason for the denial was discrimination. The trial court's focus upon the credibility of the college's reason (the course evaluations) was a misreading of *Hicks*, according to the appellate court. It rejected the findings of the lower court regarding the suspect nature of the course evaluations, stating that there was no evidence apart from speculation that they were tainted. The court noted that the college had implemented the Ph.D. requirement before Jiminez was hired, but after the white faculty member was hired; thus, the requirement had not applied to the white faculty member. Furthermore, other white faculty members hired at the same time as Jiminez were denied tenure because they lacked the Ph.D.

This case is very fact-sensitive, but it illustrates the importance of consistent treatment of faculty hired at the same time, as well as the importance of notice to faculty members whose teaching (or research or service) is unacceptable. It also suggests that plaintiffs will have more difficulty proving their allegations of discrimination under *Hicks* because they must do more than simply cast doubt upon the credibility of the college's reason for the tenure denial.

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A federal trial court addressed the issue of whether a personality characteristic, alleged to be linked to an individual's national origin, can be a source of discrimination. In *Javetz v. Board of Control, Grand Valley State University*, 903 F. Supp. 1181 (W.D. Mich. 1995), a faculty member who was a native of Israel was notified that her contract would not be renewed, and that she would not be evaluated for tenure. She sued the institution, alleging discrimination on the basis of national origin, religion, and gender. Among other claims, she asserted that she was discriminated against because of her personality. She argued that Israelis are "opinionated and direct," and that these are immutable characteristics and thus an inherent part of her national origin. To the extent that her colleagues and students perceived her as "confrontational, demanding, [and] difficult," (a few of the reasons given for her nonrenewal), she attributed this to her national origin and argued that negative reactions to her personality were national origin discrimination. The court refused to accept this characterization, adding that "the law does not prohibit discrimination in the workplace based on conduct that interferes with the performance of job responsibilities," and noting that:

> when a teacher's communication and relational habits are perceived both by students and colleagues as frustrating teaching effectiveness, the academy's very mission, the law ought not interfere with legitimate corrective measures, even though the deleterious habits be culturally influenced [903 F. Supp. at 1190].

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There have been further proceedings in the *Arenson* case (LHE 3d, p. 237). Although the jury found in Arenson's favor, the district court trial judge granted judgment to the university. Arenson appealed, a federal appellate court reversed the trial judge, and the trial judge then ordered a new trial. Arenson did not prevail at the second trial; the trial judge directed a verdict for all but one of the defendants at the close of the plaintiff's case. The jury found for the remaining defendant. Arenson appealed again, claiming that the district court should not have ordered the second trial because, at the time the trial court granted the judgment to the university, it did not rule on the university's motion for a new trial. Despite its discomfort with the fact that two juries reached different conclusions in this very close case, and that the trial judge had concluded that Arenson should not have prevailed, the federal appellate court ruled that the second trial should not have been granted. Judgment was granted for Arenson, and he was awarded attorneys fees as a prevailing party. *Arenson v. Southern University Law Center*, 43 F.3d 194 (5th Cir.), *decision clarified on rehearing*, 53 F.3d 80 (5th Cir. 1995).

3.3.4. Sex discrimination and sexual harassment. In a closely watched case, the U.S. Court of Appeals for the Second Circuit has reversed the finding of a trial court that Vassar College discriminated against Professor Cynthia Fisher when it denied her tenure because, among other reasons, she had "been away from science" for too long because she interrupted her career for nine years to raise her children. In *Fisher v. Vassar College*, 852 F. Supp.

1193 (S.D.N.Y. 1994), *reversed en banc*, 114 F.3d 1332 (2d Cir. 1997), the trial court cited Fisher's strong publication record (finding it superior to that of several male faculty who were tenured just before and just after Fisher was denied tenure), her success at obtaining research grants, and the fact that no married woman had received tenure in the hard sciences at Vassar for the thirty years prior to Fisher's tenure review as evidence that the college had engaged in age and marital status discrimination (but not sex discrimination, because another female faculty member in that department had received tenure the same year that Fisher's tenure bid was denied). The court also found that Fisher's salary was depressed as a result of marital status discrimination.

On appeal, a panel of the U.S. Court of Appeals for the Second Circuit reversed, but that opinion was withdrawn when the full court determined to hear oral arguments *en banc*. The *en banc* court limited its review to whether its own precedent limited its ability to reverse the lower court, given that the trial court had ruled that the plaintiff had established both a prima facie case of discrimination and that the college's reasons for the tenure denial were a pretext for discrimination. The *en banc* court ruled that the findings of the trial judge were clearly erroneous, finding them "insupportable."

Like other recent discrimination cases, this case demonstrates the influence of *St. Mary's Honor Center v. Hicks* (LHE 3d, pp. 202-203). It also demonstrates that appellate judges are sharply divided on the meaning of *Hicks*, as well as on the standard of review to be used in a Title VII case. Six judges joined the majority, one judge concurred in part and dissented in part, and four judges dissented from the majority opinion.

Simply because the plaintiff might have been able to demonstrate that the college's reason for the tenure denial was pretextual, said the majority, did not mean that a finding of discrimination was warranted. Showing some understanding of academic politics, the judge writing for the majority commented:

> In some cases, an employer's proffered reason is a mask for unlawful discrimination. But discrimination does not lurk behind every inaccurate statement. Individual decision-makers may intentionally dissemble in order to hide a reason that is non-discriminatory but unbecoming or small-minded, such as back-scratching, log-rolling, horse-trading, institutional politics, envy, nepotism, spite, or personal hostility. For example, a member of a tenure selection committee may support a protégé who will be eligible for tenure the following year. If only one tenure line is available, that committee member might be inclined to vote against tenure . . . thereby ensuring that the tenure line remains open. Any reason given by the committee member, other than the preference for his protégé, will be false . . . [T]he fact that the proffered reason was false does not necessarily mean that the true motive was the illegal one argued by the plaintiff [114 F. 3d at 1337].

The majority left undisturbed the ruling by the appellate panel that, although Fisher had established a prima facie case of age and marital status discrimination, the college had supplied sufficient neutral reasons for the tenure denial (inability to meet the standards for tenure and inferior qualifications to other tenure candidates). Despite the trial court's finding that some of the college's reasons were inaccurate, the panel had held that the trial court's findings were insufficient to support a finding of actual discrimination against Fisher.

The dissenting judges criticized the majority for substituting its judgment for that of the factfinder (the trial judge), and castigated the majority for protecting untruthful employers from a finding of discrimination, absent some clear evidence of discriminatory conduct. They also asserted that the en banc panel should review every finding made by the trial court de novo rather than relying on the panel's review.

The sharp division between the judges in this circuit suggests that, despite a quarter century of litigation under Title VII, the analysis of evidence, the role of the appellate court, and the significance of the prima facie case and pretext portions of the case continue to need clarification. Resistance to the *Hicks* doctrine is evident in the dissents. The parties in academic Title VII cases will find limited guidance in *Fisher* for how evidence should be characterized, by either the plaintiff or the defendant college.

3.3.8. Sexual orientation discrimination. Two state courts have made opposing rulings in litigation concerning health insurance coverage for the domestic partners of gay employees. The state supreme court of Alaska ruled that the University's refusal to provide health insurance for the domestic partners of unmarried employees was a violation of the Alaska Human Rights

Act (AS 18.80.220(a)(1)), which forbids employment discrimination on the basis of marital status. However, a New Jersey appellate court has ruled that Rutgers University did not violate state law when it refused to provide health benefits to the domestic partners of gay employees.

In the Alaska case, *University of Alaska v. Tumeo*, 933 P.2d 1147 (Alaska 1997), the court noted that the University had admitted that its position on health insurance constituted discrimination on the basis of marital status. But the University argued that the Human Rights Act's prohibition against such discrimination did not apply to these circumstances because the plaintiffs were not "similarly situated" to married couples in that they were not legally obligated to pay the debts of their domestic partners. The state's high court disagreed, saying that the University had three options, all of which complied with the Human Rights Act.

> 1. It could refuse to provide health insurance for spouses of its employees;
> 2. It could rewrite its plan to include within the category of "dependents" all individuals for whom its employees provide the majority of financial support;
> 3. It could rewrite the plan to specifically include coverage for domestic partners and could require employees and their partners to provide affidavits of spousal equivalency.

Nor did the state laws governing health benefits for public employees supersede the Human Rights Act or prohibit the University from providing health insurance for unmarried domestic partners. Stating that the "clear language" of the law prohibits marital status discrimination, the court unanimously ruled for the plaintiff-employees. (The University had changed its policy to provide such benefits to those who provided "spousal equivalency" affidavits in 1995, but had sought clarification of whether the law actually required such a program. Lisa Guernsey, "State Courts Split on Benefits for Domestic Partners," *The Chronicle of Higher Education*, March 28, 1997, A13.)

The New Jersey case, *Rutgers Council of AAUP Chapters v. Rutgers, The State University*, 689 A.2d 828 (N.J. Super. A.D., 1997) differs from the Alaska situation in several respects. First, although the state's Law Against Discrimination outlaws employment discrimination on the basis of both marital status and sexual orientation, the law contains an exemption for employee benefits plans. Therefore, the court was required to examine the wording of the state's statute on health benefits for state employees, which defines "dependents" as children or married spouses. Finding no language in the benefits statute that would compel the University to provide insurance for unmarried domestic partners, the opinion's author, Judge Thomas F. Shebell, Jr., noted that the impetus for providing such benefits should come from the legislature, not the courts; a first step would be to legalize marriage between gay or lesbian couples, according to the judge. Concurring judges noted that, although they could not disagree with the legal analysis, they found the decision "distasteful" and unfair, and urged the legislature to take action.

The plaintiffs had also argued that denying benefits to the domestic partners of state employees violated the equal protection clause of the state's constitution; the court disagreed, stating that sexual orientation classifications have not been found to be "suspect" by federal courts, and thus the state court would not make such a finding (see generally LHE 3d, Section 3.3.2.7).

Sec. 3.4. Affirmative Action in Employment

The U.S. Supreme Court extended its analysis of *Croson* (LHE 3d, pp. 265-267) in *Adarand Constructors v. Pena*, 115 S. Ct. 2097 (1995), a case involving contracts awarded by the U.S. Department of Transportation. Adarand, the low bidder on a subcontract for guard rails for a highway project, mounted an equal protection challenge under the Fifth Amendment to the DoT's regulations concerning preferences for minority subcontractors. The regulations provided the prime contractor with a financial incentive to award subcontracts to small businesses certified to be controlled by "socially and economically disadvantaged" individuals. Adarand was not so certified, and the contract was awarded to a certified subcontractor whose bid was higher than Adarand's.

In a 5-4 ruling, the Court stated that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." The Court's earlier acceptance of a lower standard of review when federal agencies created minority preferences, discussed in *Metro Broadcasting* (LHE 3d, p. 366), was rejected, and *Metro Broadcasting* was overruled. The Court remanded the case for a trial on the issue of whether the federal contracting program's subcontracting regulations met the strict scrutiny test. In June, 1997, a federal trial judge ruled that the program failed the strict scrutiny test (1997 U.S. Dist. LEXIS 7677 (D. Colo., June 2, 1997)).

Although *Adarand* is limited to federal contracting, it suggests a movement away from preferences based upon characteristics such as race or gender. It is unclear what significance *Adarand* may have as a predictor of the Court's expected opinion in *Taxman* (discussed below in this section of the Supplement).

* * * * *

A federal appellate opinion involving racial preferences in a layoff of a high school teacher has important implications for affirmative action in employment. In *Taxman v. Board of Education of the Township of Piscataway*, 91 F.3d 1547 (3d Cir. 1996), an *en banc* ruling (8-4), the court found that the school board's use of race to choose between two equally qualified teachers in a layoff decision violated Title VII and the New Jersey Law Against Discrimination. The school board had not claimed that its use of race to make the decision was motivated by the need to remedy past or present discrimination, but rather had selected the white teacher for layoff in order to increase the diversity of its teaching staff.

The *en banc* court looked to Supreme Court precedent, most notably *Weber*, in order to determine whether the use of race in this situation was permissible under Title VII. The majority interpreted *Weber* to require the defendant to prove that (1) its action "mirrored the purpose of the statute" (that race-conscious decisions increasing diversity was a goal of Title VII when enacted); and (2) its decision did not "unnecessarily trammel" the interests of nonminority employees. The court found that Title VII's sole purpose was remedial, and that fostering diversity had not been a motivation for the statute's enactment. Therefore, the only permissible motive for a race-conscious employment decision would be to remedy the school district's own prior discrimination. Since there was no evidence of such prior discrimination (in fact, the district's workforce was racially and ethnically diverse), the school district's action violated Title VII. Furthermore, said the court, the decision caused a tenured teacher to lose her job, which meant that the interests of a nonminority employee (the plaintiff) were "unnecessarily trammeled." The court distinguished the *Johnson* case, in which the plaintiff was merely eligible for a promotion, and did not lose his job as did Ms. Taxman.

At present, *Taxman* is binding only in New Jersey, Pennsylvania, Delaware and the Virgin Islands. Although the opinion focuses on layoffs, its reasoning appears to apply to any employment decision. Given the court's broad language rejecting ethnic or racial diversity as a goal of Title VII, the opinion would apparently restrict the affirmative action efforts of colleges and universities that have no record of discrimination but that wish to increase the diversity of their workforce. The broad sweep of the majority opinion's language suggests that the court has effectively equated Title VII and the equal protection clause of the Constitution by stating that the only permissible purpose for race-conscious decisions under Title VII is remediation of the employer's own past or present discrimination. This is a far narrower interpretation of Title VII than that of the Supreme Court in *Weber* or *Johnson v. Transportation Agency*, and the interpretation relies on the Supreme Court's reasoning in Equal Protection Clause cases such as *Wygant v. Jackson*.

The Piscataway School District petitioned for certiorari. Before the U.S. Supreme Court decided whether to grant the writ, it asked the U.S. Department of Justice to provide advice on two issues: (1) whether certiorari should be granted and (2) if so, how the Court should rule (117 S. Ct. 763 (1997)). The Justice Department recommended against the grant of certiorari but the Supreme Court nevertheless granted the writ (117 S. Ct. 2506 (1997)).

Sec. 3.6. Procedures for Faculty Personnel Decisions

3.6.1. General principles. As discussed in LHE 3d, pages 151-153, institutional policies and other documents may become part of the faculty member's contract of employment. Interesting legal questions may arise when the institution attempts to enforce its policy against sexual harassment and uses that policy to discipline or terminate a faculty member when other institutional policies on discipline or termination exist that may provide greater procedural or substantive protections to faculty.

In *Chan v. Miami University*, 652 N.E.2d 644 (Ohio 1995), Professor Chan asserted that the university had breached his contract by terminating him under the rule prohibiting sexual harassment rather than under the rule that governed the termination of tenured faculty members. Although Miami

University is a public institution, the plaintiff did not bring constitutional claims, but rather focused on the due process rights provided by the university's rule concerning the termination of tenured faculty. Chan did not dispute the university's right to determine the validity of the sexual harassment charge against him using its harassment policy and procedure; his argument was that after this determination was made, he was entitled to the benefits of the university's procedure for the termination of tenured faculty members prior to his separation from the university. Although the university argued that the sexual harassment complaint process provided sufficient procedural safeguards for respondents, nothing in that policy superseded the more general termination regulations. Furthermore, while the more general regulations provided for representation by counsel, the harassment policy did not. The court held that terminating Professor Chan under the harassment policy and procedures, without using the more general regulations, constituted a breach of contract that denied him due process.

3.6.2. The public faculty member's right to constitutional due process.

3.6.2.2. Denial of tenure. The U.S. Court of Appeals for the Eighth Circuit has rejected a professor's claim that her tenure denial was invalid because her dean's oral promise to support her for tenure was contractually binding on the university. She had executed annual contracts with the university, and the university's written policies provided that a formal tenure review must be conducted and the Board of Regents had the sole authority to grant tenure. *Geddes v. Northwest Missouri State University*, 49 F.3d 426 (8th Cir. 1995).

3.6.2.3. Termination of tenure. The U.S. Court of Appeals for the Third Circuit has addressed the sufficiency of a college's pretermination procedures in light of the constitutional standard articulated by the U.S. Supreme Court in *Loudermill* (LHE 3d, p. 289). In *McDaniels v. Flick*, 59 F.3d 446 (3d Cir. 1995), the court reversed a jury finding on behalf of the professor, ruling that the college should have been awarded summary judgment. McDaniels, a tenured professor at Delaware County Community College, had been warned, after two male students complained that McDaniels had sexually harassed them, that he would be disciplined or terminated if he repeated the behavior. The following year, another student filed a harassment complaint against McDaniels. After investigating the charges, the college decided to discharge him. He was told to attend a meeting with the college's personnel director and the dean to "discuss a student problem." He was not advised that the "problem" was a charge of sexual harassment until he arrived at the meeting, at which time he was also advised that the college would begin termination proceedings. Later, the personnel director confirmed this information in writing.

The college's policies provided for a pre-termination appeal to the president, of which McDaniels took advantage. The President, after investigating the allegations, recommended to the Board of Trustees that they proceed with the termination. The trustees voted unanimously to terminate McDaniels. The college's collective bargaining agreement also provided for post-termination arbitration. Although McDaniels began arbitration proceedings, he also filed an action under 42 U.S.C. section 1983 (see LHE 3d, Section 2.3.3), claiming that the college had violated his Fourteenth Amendment due process rights. The arbitration was stayed pending the results of the litigation.

The college filed a motion for summary judgment, but the trial judge denied the motion and held a trial. Although the jury found that the college had adequately informed McDaniels of the charges against him, it determined that the college had not given him an opportunity to respond fully to the charges before it made the termination decision. The judge ordered McDaniels reinstated with back pay.

Evaluating the college's actions in light of *Loudermill*, the appellate court made short work of McDaniels' claim that, because he was a tenured professor of 20 years' standing, he was due more procedural protection than that provided by *Loudermill*:

> It is true that McDaniels has a property interest in his continued employment and perhaps a liberty interest in clearing his reputation of sexual harassment charges. But McDaniels appears to argue that because he is a professor and has been at the college for 20 years, his property interest in continued employment is constitutionally greater than those held by the employees in *Loudermill*. Yet he has not offered any basis on which we could or should distinguish reasonably between the interest of a tenured employee who has worked 20 years and the interest of one who has worked only one year for the same employer and we can conceive of no principled way to distinguish between the two. Arguably, the

> interest in continued employment may be greater for younger employees who have started only recently because they have potentially more years of employment ahead [59 F.3d at 455].

The court also rejected McDaniels' assertion that he should have received the procedural safeguards approved by that same appellate court in *Skehan v. Board of Trustees of Bloomsburg State College* and *Chung v. Park* (LHE 3d, p. 299). Although that court in those opinions had approved a six-step pretermination procedure as consistent with due process requirements, the *McDaniels* court stated that in neither case had it ruled that all of these steps were required prior to the termination, and that some of the steps could be provided after termination.

The court rejected the jury's finding that McDaniels had not been afforded an opportunity to respond to the charges. He had denied the charges at the initial meeting, had provided additional written information, and was given nearly a month to prepare for his appeal to the president. The President read and responded to McDaniels' submissions, said the court, and that was a sufficient opportunity for the college to consider his side of the story.

The court rejected McDaniels' claim that his due process rights were denied because he was never given a copy of the allegations against him. "[P]retermination notice of the charges and evidence against an employee need not be in great detail as long as it allows the employee 'the opportunity to determine what facts, if any, within his knowledge might be presented in mitigation of or in denial of the charges'" (59 F.3d at 457, citations omitted).

The fact that, at the initial meeting, McDaniels was asked specific questions about the allegations gave him an opportunity to respond meaningfully to the charges, said the court.

McDaniels also argued that the pretermination procedure was a sham because the administrators were biased against him, knew that the harassment allegations were false, and were simply trying to rid the college of a highly-paid tenured professor. The court stated:

> In the case of an employment termination case, "due process [does not] require the state to provide an impartial decisionmaker at the pre-termination hearing. The state is obligated only to make available "the means by which [the employee] can receive redress for the deprivations" [59 F.3d at 459, quoting *Schaper v. City of Huntsville*, 813 F.2d 709, 715-16 (5th Cir. 1987)].

Because the Board of Trustees provided McDaniels with a neutral decision-maker at the post-termination stage, the due process protections were sufficient.

One judge dissented, agreeing with McDaniels' assertion that the lack of notice of the charges prior to the pretermination meeting violated his due process rights. But the majority responded that McDaniels was not terminated at the end of the meeting; the Board of Trustees terminated him three weeks later after an appeal to the President, which the majority believed gave McDaniels sufficient time and opportunity to respond to the charges.

McDaniels probably represents the minimum due process that institutions must afford tenured professors or other employees who have a property right in continued employment. Despite the favorable outcome for the college in this case, most public institutions will very likely continue to follow a version of the termination procedure discussed in *Chung*, or a similar procedure summarized on page 289 of LHE 3d.

3.6.2.4. Other personnel decisions. The U.S. Supreme Court has issued a ruling that establishes the due process rights of a tenured public employee who is suspended without pay. In *Gilbert v. East Stroudsburg University*, 117 S. Ct. 1807 (1997), Richard Homar, a police officer at the University, was arrested by the state police in a drug raid. He was charged with possession of marijuana and other drug-related crimes which constitute felonies under Pennsylvania law. When the state police notified Homar's supervisor of the arrest, the supervisor notified the director of Human Resources, who had been delegated authority by the president to discipline employees. The director immediately suspended Homar without pay, and sent him a letter advising him of the suspension and the university's intention to investigate the charges.

The criminal charges were dropped approximately one week later; two weeks after that, the director of Human Resources and Homar's supervisor met with him to give him the chance to explain his side of the story. Homar was not told that college officials had the police report, which contained a confession that he had allegedly made. Six days later, Homar received a copy of the police report and a letter from the director of Human

Resources, advising him that he had been demoted to a groundskeeper, and that he would receive back pay at the groundskeeper rate from the date of his suspension. (He eventually received full back pay at the rate of a police officer.) Homar requested a meeting with the University president. After giving Homar an opportunity to respond to the charges made by the university officials, the president sustained the demotion.

Homar filed a Section 1983 claim (see LHE 3d, Section 2.4.3), contending that his suspension without pay prior to meeting with university officials violated his due process rights. Although the U.S. Court of Appeals for the Third Circuit had ruled that the university's failure to provide Homar with a pre-suspension hearing violated due process guidelines, the Supreme Court reversed in a unanimous opinion written by Justice Scalia. Noting that the extent of due process clause protections for discipline short of termination was an issue of first impression for the Court, the opinion emphasized the flexible nature of due process, particularly in situations such as Homar's where the employer believed it needed to act quickly to protect the public's confidence in the integrity of law enforcement personnel. Evaluating the university's actions against the standard of *Mathews v. Eldridge* (LHE 3d, p. 291), the Court distinguished between an employee's interest in remaining employed and his interest in the temporary loss of pay, characterizing the loss in this case as "insubstantial." On the other hand, said the Court, the university had a strong interest in acting quickly, given that felony charges had been filed against Homar. And thirdly, there was little need for a pre-suspension hearing, since the felony charges that had been filed against Homar provided a reasonable basis for suspending him.

The Court's focus on the university's need to act quickly suggests that this case may not have general applicability to the suspension of tenured faculty members. Unless a college could demonstrate that it needed to remove a tenured faculty member quickly because he or she was a potential threat to the health or safety of others, or because the faculty member had committed some act that rendered him or her unfit to continue teaching pending a disciplinary hearing, it would probably be difficult for a public college to justify suspension without the panoply of pre-suspension due process protections.

The lower courts had not addressed the issue of whether the university violated Homar's due process rights because of the lapse of time between the dropping of the felony charges and his meeting to explain his side of the story (sixteen days). As a consequence, the Court remanded the case to the appellate court for consideration of this issue.

* * * * *

Some medical centers affiliated with universities are implementing new salary policies for their tenured faculty, in many cases as a result of the changes brought by managed health care. In *Williams v. Texas Tech University Health Sciences Center*, 6 F.3d 290 (5th Cir. 1993), a tenured professor at the medical school challenged his reduction in salary as a violation of his due process rights, alleging that he should have been provided a hearing before the decision was made. His salary had been reduced because, according to his department chair, Williams had not generated the expected amount of grant income. Williams was given six months notice of the salary reduction, which was from $68,000 to $46,500.

Although the court did not explicitly find that Williams had a property interest in the former salary amount, it determined that he received sufficient due process protections. Citing the U.S. Supreme Court decision in *Mathews v. Eldridge* (LHE 3d, p. 291), the court listed three factors that must be weighed to determine how much protection a property interest deserves. In this situation, said the court, the letter provided Williams with notice and with the opportunity to seek grant funding to supplement his salary. Williams responded to the letter. Nothing more was required to be done, according to the court, noting that state institutions needed substantial discretion to administer their educational programs and to make budgetary decisions. Furthermore, said the court, Williams' interest in attaining a specific income does not outweigh the state's interest. The court affirmed the trial court's summary judgment for the university.

* * * * *

A Georgia appellate court has rejected the claim of a former dean that removal from his position as dean and his forced return to the faculty constituted a breach of contract and a denial of due process. In *Jahannes v. Mitchell*, 469 S.E.2d 255 (Ga. App. 1996), the court rejected the dean's contention that the college should have followed the provisions of the faculty contract that would have entitled him to a hearing prior to removing him as dean. The court ruled that the provisions of the faculty contract applied to the dean's position as a tenured faculty member, but not to his position as dean. Because his position as dean was at-will, said the court, he had no contractual right nor property right in that position.

* * * * *

A federal appellate court has rejected the claim of department chairs at the University of the District of Columbia that, because the university had given them summer contracts for the previous ten years, they had a property interest in their summer pay. A decision had been made near the end of spring semester to withhold summer contracts because of budget limitations; the chairs asserted that they were denied due process. The court rejected the property interest claim outright. In addition, the court ruled that, because the chairs had not used the university grievance system, any lack of due process protections was the result of their own inaction. The court affirmed the trial court's award of summary judgment for the university. *UDC Chairs Chapter, American Association of University Professors v. Board of Trustees of the University of the District of Columbia*, 56 F.3d 1469 (D.C. Cir. 1995).

Sec. 3.7. Faculty Academic Freedom

3.7.1. General concepts and principles. The most recent case in the *Pickering* line (LHE 3d, pp. 303-305) is *Waters v. Churchill*, 114 S. Ct. 1878 (1994), which concerned a hospital's termination of a nurse because of statements she had made to a co-worker about the hospital. The Justices filed four opinions displaying different perspectives on the First Amendment issues. Although there was no majority opinion, the plurality opinion by Justice O'Connor and two concurring opinions (by Justice Souter and Justice Scalia) stressed the need for courts to be deferential to employers when applying the *Pickering* factors. In particular, according to *Waters*: (1) in evaluating the impact of the employee's speech, the public employer may rely on its own reasonable belief regarding the content of the speech, even if that belief later proves to be inaccurate;[1] and (2) in evaluating the disruptiveness of the employee's speech, a public employer does not need to determine that the speech actually disrupted operations, but only that the speech was potentially disruptive.

The first aspect of *Waters* is discussed briefly in LHE 3d, Section 3.7.6 (p. 331). Apparently, to fulfill this requirement, the employer's belief must be an actual or real belief arrived at in good faith. O'Connor's opinion, for instance, indicates that the employer must "really . . . believe" (114 S. Ct. at 1890) the version of the facts it relies on. In addition, the employer's belief must also be objectively "reasonable" in the sense that it is based on "an objectively reasonable investigation" of the facts (114 S.Ct. at 1892 (Souter opinion); see also 114 S.Ct. at 1889-1890 (O'Connor opinion)).

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[1] As with other cases in the *Pickering* line, there is potentially a related question whether the employer terminated the employee because of unprotected (disruptive) speech or conduct, or because of other, protected, speech. See LHE 3d, Sections 3.7.6 (pp. 328-330) and 3.7.4 (pp. 315-316). In *Waters*, the Court raised this issue but did not resolve it, instead remanding the case to the lower courts for further fact determinations (114 S.Ct. at 1891 (O'Connor opinion)).

O'Connor suggests that reasonableness be evaluated by the standard of care that "a reasonable manager" would use under the circumstances.

The second aspect of *Waters* was discussed and relied on in a subsequent U.S. Court of Appeals opinion in *Jeffries v. Harleston* (see this Supp., Section 3.7.5.). Under this second requirement, the employer may prevail by showing that it made a "reasonable prediction of disruption" or that "the [employee's] speech is, in fact, likely to be disruptive" (114 S.Ct. at 1887 (O'Connor, J.)). The reasonableness of the prediction would likely be evaluated under an objective standard much like that which O'Connor would use to determine the reasonableness of the employer's belief about the facts. Even if the predicted harm "is mostly speculative," however, the Court will be deferential to the employer's interests and give the employer's finding substantial weight (114 S. Ct. at 1887 (O'Connor, J.)). In *Waters* itself, for instance, "the potential disruptiveness of the [nurse's] speech as reported was enough to outweigh whatever First Amendment value it might have had" (114 S.Ct. at 1890 (O'Connor, J.)).

3.7.2. Academic freedom in the classroom. Two other courts have recently sided with the faculty member rather than with the institution in disputes regarding teaching methods and classroom behavior. Both cases are especially important examples of cutting-edge academic freedom problems because they arise in the context of alleged sexual harassment and present a potential clash between the faculty's interest in academic freedom, the institution's interest in enforcing sexual harassment policies, and the students' interest in being free from harassment. The two cases are *Silva v. University of New Hampshire*, decided in 1994, and *Cohen v. San Bernardino Valley College*, decided in 1995 and reversed in 1996. *Cohen* is the more important of the two cases -- because it is better reasoned and because it reached a higher-level court -- and is thus presented first.

In the *Cohen* case, 92 F.3d 968 (9th Cir. 1996), *reversing* 883 F. Supp. 1407 (C. D. Cal. 1995), the appellate court used the constitutional "void for vagueness" doctrine to invalidate a college's attempt to discipline a teacher for classroom speech. The case provides the most pointed discussion to date of the tension between faculty academic freedom and students' claims to be free from sexual harassment in the classroom.

The plaintiff, Cohen, was a tenured professor at San Bernardino Valley College. A student in his remedial English class complained that he used vulgarities and obscenities in class, and focused on topics of a sexual nature:

> One student in the class . . . became offended by Cohen's repeated focus on topics of a sexual nature, his use of profanity and vulgarities, and by his comments which she believed were directed intentionally at her and other female students in a humiliating and harassing manner. During this class Cohen began a class discussion on the issue of pornography and played the "devil's advocate" by asserting controversial viewpoints. Cohen has for many years typically assigned provocative essays such as Jonathan Swift's "A Modest Proposal" and discussed subjects such as obscenity, cannibalism, and consensual sex with children in a "devil's advocate" style. During classroom discussion on

> pornography in the remedial English class . . . Cohen stated in class that he wrote for Hustler and Playboy magazines and he read some articles out loud in class. Cohen concluded the class discussion by requiring his students to write essays defining pornography. When Cohen assigned the "Define Pornography" paper, [the student] asked for an alternative assignment but Cohen refused to give her one.
>
> [The student] stopped attending Cohen's class and received a failing grade for the semester [92 F.3d at 970].

The student filed a grievance against Cohen, alleging that his behavior violated the college's new sexual harassment policy, which provided that:

> Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal, written, or physical conduct of a sexual nature. It includes, but is not limited to, circumstances in which: . . .
>
> (2) Such conduct has the purpose or effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile, or offensive learning environment . . . [92 F.3d at 971].

After a hearing and appeal, the college found that Cohen had violated part (2) of the policy and ordered him to:

> (1) Provide a syllabus concerning his teaching style, purpose, content, and method to his students at the beginning of class and to the department chair . . . ;
>
> (2) Attend a sexual harassment seminar . . .;
>
> (3) Undergo a formal evaluation procedure . . . ; and
>
> (4) Become sensitive to the particular needs and backgrounds of his students, and to modify his teaching

> strategy when it becomes apparent that his techniques create a climate which impedes the students' ability to learn [92 F.3d at 971].

The district court rejected Cohen's claim that application of the sexual harassment policy violated his right to academic freedom:

> The concept of academic freedom . . . is more clearly established in academic literature than it is in the courts . . . [and] judicial application of this doctrime is far from clear. [Furthermore], a review of the case law shows that, despite eloquent rhetoric on 'academic freedom', the courts have declined to cede all classroom control to teachers [883 F. Supp. at 1412, 1414].

That court also rejected Cohen's claim that, under *Connick v. Myers*, 461 U.S. 138 (1983) (see LHE 3d, Section 3.7.1), the college had violated his free speech rights as a public employee. The court divided Cohen's speech into two categories -- (1) vulgarities and obscenities, and (2) comments related to the curriculum and focusing on pornography and other sexual topics. It concluded that the speech in the first category was not on matters of public concern but that the speech in the second category was on matters of public concern because Cohen did not speak merely to advance some purely private interest.

Thus, under *Connick*, the college could regulate the first type of speech but could regulate the second only it it could justify a restriction in terms of the speaker's job duties and the efficient operation of the college.

The court agreed that the college had demonstrated sufficient justification:

> [A]lthough there is evidence in the record that Cohen's teaching style is effective for at least some students [and that] Cohen's colleagues have stated that he is a gifted and enthusiastic teacher . . . [whose] teaching style is within the range of acceptable academic practice . . . the learning process for a number of students was hampered by the hostile learning environment created by Cohen. According to one peer evaluator who observed a class in which Cohen discussed... the topic of consensual sex with children, Cohen's 'specific focus impedes academic success for some students' [883 F. Supp. at 1419].

In an important qualification, however, the court cautioned that:

> In applying a 'hostile environment' prohibition, there is the danger that the most sensitive and the most easily offended students will be given veto power over class content and methodology. Good teaching should challenge students and at times may intimidate students or make them uncomfortable. Colleges and universities . . . must avoid a tyranny of mediocrity, in which all discourse is made bland enough to suit the tastes of all the students. However, colleges and universities must have the power to require professors to effectively educate all segments of the student population, including those students unused to the rough and tumble of intellectual discussion. If colleges and universities lack this power, each classroom becomes a separate fiefdom in which the educational process is subject to professorial whim. Universities must be able to ensure that the more vulnerable as well as the more sophisticated students receive a suitable education. . . . Within the educational context, the university's mission is to effectively educate students, keeping

> in mind students' varying backgrounds and sensitivities. Furthermore, the university has the right to preclude disruption of this educational mission through the creation of a hostile learning environment. . . . The College's substantial interest in educating all students, not just the thick-skinned ones, warrants . . . requiring Cohen to put potential students on notice of his teaching methods [883 F.Supp. at 1419-21].

Moreover, "this ruling goes only to the narrow and reasonable discipline which the College seeks to impose. A case in which a professor is terminated or directly censored presents a far different balancing question. Further, the Court notes that the College must avoid restricting creative and engaging teaching, even if some over-sensitive students object to it" (883 F.Supp. at 1422).

On appeal, the United States Court of Appeals for the Ninth Circuit unanimously overruled the district's decision but did so on different grounds than those explored by the district court. The court emphasized that neither it nor the U.S. Supreme Court had yet determined the scope of First Amendment protection to be given to a professor's classroom speech. Rather than engage in this analysis, the court focused its opinion and analysis on the vagueness of the college's sexual harassment policy and held that "the Policy's terms [are] unconstitutionally vague as applied to Cohen in this case." The court did not address whether or not the "College could punish speech of this nature if the policy were more precisely construed by authoritative interpretive guidelines or if the college were to adopt a clearer and more precise policy."

In its analysis, the appellate court noted three objections to vague college policies:

> First, they trap the innocent by not providing fair warning. Second, they impermissibly delegate basic policy matters to low level officials for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, a vague policy discourages the exercise of first amendment freedoms [92 F.3d at 972].

Guided by these concerns, the court reasoned that:

> Cohen's speech did not fall within the core region of sexual harassment as defined by the Policy. Instead, officials of the College, on an entirely ad hoc basis, applied the Policy's nebulous outer reaches to punish teaching methods that Cohen had used for many years. Regardless of what the intentions of the officials of the College may have been, the consequences of their actions can best be described as a legalistic ambush. Cohen was simply without any notice that the Policy would be applied in such a way as to punish his longstanding teaching style -- a style which, until the College imposed punishment upon Cohen under the Policy, had apparently been considered pedagogically sound and within the bounds of teaching methodology permitted at the College [92 F.3d at 972].

Since the appellate court's reasoning is different from the district court's, and since the appellate court does not disagree with or address the issues that were dispositive for the district court, the latter's analysis remains a useful illustration of how other courts may handle such issues when they arise under policies that are not unconstitutionally vague.

In the second case, *Silva v. University of New Hampshire*, 888 F.Supp. 293 (D.N.H. 1994), a tenured faculty member challenged the university's determination that he had created a hostile or offensive academic environment in his classroom and therefore violated the university's sexual harassment policy. Seven women students had filed formal complaints against Silva. These complaints alleged that, in a technical writing class, he had compared the concept of focus to sexual intercourse ("Focus is like sex. You seek a target. You zero in on your subject. You move from side to side. You close in on the subject. You bracket the subject and center on it. Focus connects the experience and language. You and the subject become one") (888 F.Supp. at 299). The complaints also alleged that two days later in the same class Silva made the statement "[b]elly dancing is like jello on a plate with a vibrator under the plate" to illustrate the use of metaphor. In addition, several female students reported that Silva had made sexually suggestive remarks to them, both in and out of the classroom. For example, they alleged that Silva told one of his female students, whom he saw in the library kneeling down to look through a card catalog, "it looks like you've had a lot of experience down there;" that he gave a spelling test to another student in which every third word had a "sexual slant;" that he had asked two of his female students how long they had been together, implying a lesbian relationship; that he had asked another female student "how would you like to get an A?"; and that he had physically blockaded a student from exiting a vending machine room and complained to her about students' actions against him (888 F.Supp. at 310-311).

These complaints were processed through a two-stage university grievance system that consisted of an informal hearing on the sexual harassment charges followed by a formal sexual harassment hearing. The informal hearing was held before the faculty grievance committee, and the formal proceedings were held before a hearing panel ("hearing panel") of faculty and students which found that Silva's language and innuendos violated the university's sexual harassment policy. The hearing panel emphasized that a reasonable female student would find Silva's comments and behavior to be offensive; that this was the second time in a two-year period that Silva had been formally notified "about his use of inappropriate and sexually explicit remarks in the classroom;" and that Silva had given the panel "no reason to believe that he understood the seriousness of his behavior" or its impact on the students he taught. As a result, the university suspended Silva without pay for at least one year, required him to undergo counseling at his own expense, and prohibited him from attempting to contact or retaliate against the complainants.

In court, Silva argued that the university's actions violated his First Amendment rights. The court agreed and entered a preliminary injunction against the university. The court pursued three lines of analysis in determining that the university had violated Silva's free speech rights. First, relying on *Keyishian* (LHE 3d, Section 3.7.1.), the court reasoned that the belly dancing comment was "not of a sexual nature" and the sexual harassment policy therefore did not give Silva adequate notice that this statement was prohibited -- thus violating the First Amendment requirement that teachers be "clearly inform[ed]" of the proscribed conduct in order to guard against a "chilling effect" on their exercise of free speech rights. Second, relying in part on the *Kuhlmeier* case about secondary education (LHE 3d, p. 309), the court determined that the sexual harassment policy is invalid under the First Amendment, as applied to Silva's speech, because it "fails to take into account the nation's interest in academic freedom" and therefore is not "*reasonably* related to the legitimate pedagogical purpose of providing a congenial academic environment . . ." (888 F.Supp at 314). In reaching this conclusion, the court reasoned that (a) the students were "exclusively adult college students . . . presumed to have possessed the sophistication of adults;" (b) "Silva's classroom statements advanced his valid educational objective of conveying certain principles related to the subject matter of his course;" and (c) "Silva's classroom statements were made in a professionally appropriate manner . . ." (888 F.Supp. at 313).

For its third line of reasoning, the court resorted to the *Pickering* and *Connick* cases (LHE 3d, Section 3.7.1.). Purporting to apply the public concern/private concern dichotomy (LHE 3d, p. 305), the court determined that "Silva's classroom statements . . . were made for the legitimate pedagogical, *public* purpose of conveying certain principles related to the subject matter of his course" (888 F.Supp. at 316). Thus these statements "were related to matters of public concern" and, on balance, "Silva's First

Amendment interest in the speech at issue is overwhelmingly superior to UNH's interest in proscribing [the] speech" (888 F.Supp. at 316).

Taken together, the *Cohen* and *Silva* cases illustrate and confirm four alternatives for analyzing academic freedom claims, not only in the sexual harassment context but also more generally: (1) vagueness analysis; (2) notice analysis; (3) *Pickering/Connick* analysis; and (4) pedagogical or germaneness analysis.

The vagueness analysis (see generally LHE 3d, Section 3.5.1.) is exemplified by the appellate court's opinion in *Cohen*. The argument accepted by this court is that the college's policy was unconstitutionally vague *as applied* to *Cohen* under the particular facts of that case. Another, broader, version of this argument would be that a policy is unconstitutionally vague *on its face*, that is, in all or most of its possible applications rather than only as applied to the particular plaintiff's circumstances.

Notice analysis is exemplified by *Silva* (see 888 F.Supp. at 312 - 314). Like vagueness analysis, notice analysis is a derivative of the federal Constitution's free speech and due process clauses. The *Silva* court accepted the argument that, since Silva's statement about a vibrator did not violate the university's policy, Silva could not have been on notice that his statement was impermissible, and he therefore could not be penalized for it. Conceptually, this analysis is closely related to the vagueness-as-applied analysis in *Cohen*, since vague policies are invalidated by the courts in large part because "they trap the innocent by not providing fair warning" and can result in a "legalistic ambush" (*Cohen*, 92 F.3d at 972). But the *Silva* court used notice analysis to cover not only situations where the policy is vague and the court cannot determine whether it covers the particular behavior at issue, but also situations where the court determines that the particular behavior *is not covered* by the policy.

Pickering/Connick analysis is used in both the *Cohen* district court opinion and the *Silva* opinion. The earlier opinion in *Martin v. Parrish* (LHE 3d, Section 3.7.2. (pp. 308-309)) also uses this analysis. The central issue in this analysis is whether the faculty member's classroom statements were on "matters of public concern" or on "matters of private concern" (see generally LHE 3d, Section 3.7.1., (pp. 303-305)). This distinction is difficult to draw in many contexts, but is perhaps especially so in the context of classroom speech. The *Cohen* district court opinion does a fairly good job discerning the nuances of this distinction, particularly when it sorts out the various types of comments made by the professor. The *Silva* opinion, on the other hand, does not reflect these nuances and appears to expand the public concern category well beyond the U.S. Supreme Court's boundaries (see Todd De Mitchell and Richard Fossey, "At the Margin of Academic Freedom and Sexual Harassment: An Analysis of *Silva v. University of New Hampshire*," 111 *West's Educ. Law Rptr.* 13 (Sept. 19, 1996)). *Silva*, therefore, is not a helpful example of this type of analysis.

The pedagogical or germaneness analysis is used extensively in *Silva*, providing the most prominent example to date of a court attempting to use this analysis in a higher education academic freedom case. (For earlier attempts and commentary, see LHE 3d, Section 3.7.2 (pp. 308-309 *(Martin* *v. Parrish)* and p. 309 fn. 54.) This approach is more likely than the other approaches to take account of the unique circumstances of academia. It also appears to build on AAUP policies on academic freedom (see LHE 3d, Section 3.7.1. (pp. 299-300)) -- in particular the 1940 Statement, which declares that classroom academic freedom does not extend to "teaching controversial matter which has no relation to [the] subject . . ." (paragraph (b) under "Academic Freedom"); the 1970 Interpretive Comments, which add that "the intent of [the 1940 Statement] is not to discourage what is 'controversial' [but] to underscore the need for teachers to avoid persistently intruding material which has no relation to their subject" (paragraph 2); and the 1995 statement on Sexual Harassment: Suggested Policy and Procedures for Handling Complaints, which provides that speech or conduct is not considered sexual harassment "in the teaching context" unless it is "persistent, pervasive, and not germane to the subject matter" (paragraph 3 under Statement of Policy) (*AAUP Policy Documents and Reports* (the "Redbook"), pp. 3, 6, 172 (AAUP, 1995). This fourth approach, then, bears careful watching and could become the preferred approach (see, e.g., *Rubin v. Ikenberry*, 933 F.Supp. 1425 (C.D. Ill. 1996)). It is critically important, however, that this alternative be applied with considerable reliance on peer review of teaching and on expert opinion regarding learning theory and the academic parameters of particular subjects.

3.7.5. Academic freedom in private life.

3.7.5.1. Public institutions. There have been further proceedings in *Jeffries v. Harleston* (LHE 3d, p. 325) that have changed the result and reasoning in the case. The U.S. Supreme Court granted the university's petition for review of the appellate court's opinion and, upon review, remanded the case to the appellate court for reconsideration in light of *Waters v. Churchill*, 114 S. Ct. 1878 (1994) (this Supp., Section 3.7.1), a Supreme Court case decided shortly after the appellate court had issued its opinion in *Jeffries*. After reconsideration, and relying on the Supreme Court's decision in *Waters*, the appellate court reversed its earlier decision and ordered the district court to enter judgment for the defendants (*Jeffries v. Harleston*, 52 F.3d 9 (2d Cir. 1995)). (For contrasting critiques of the case, see Richard Hiers, "New Restrictions on Academic Free Speech: *Jeffries v. Harleston II*," 22 *J. of Coll. & Univ. Law* 217 (1995), and Stephen Newman, "At Work in the Marketplace of Ideas: Academic Freedom, The First Amendment, and *Jeffries v. Harleston*, 22 *J. of Coll. & Univ. Law* 281 (1995).)

In reversing its earlier decision, the appellate court did not revise its determination that Professor Jeffries' speech was on a matter of public concern. Instead the court focused on the *Pickering/Connick* balancing test (see LHE 3d Section 3.7.1), determined that *Waters* had clarified this test in a way favorable to employers, and then re-worked its balance of factors. According to the appellate court:

> [w]hittled to its core. *Waters* permits a government employer to fire an employee for speaking on a matter of public concern if: (1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech. By stressing that *actual* disruption is not required, *Waters* pulls a crucial support column out from under our earlier *Jeffries* opinion. [Thus] even when the speech is squarely on public issues -- and thus earns the greatest constitutional protection -- *Waters* indicates that the government's burden is to make a substantial showing of *likely* interference and not an *actual* disruption [52 F.3d at 13 (emphasis in original)].

Guided by this reading of *Waters*, the appellate court reviewed the jury's findings in the trial record and concluded that a majority of the defendants had "a reasonable expectation that the [off-campus] speech would harm CUNY;" and that a majority of the defendants were motivated by this "reasonable prediction of disruption" and not by a "retaliatory animus" when they demoted Jeffries. The court struck the balance in favor of the university by concluding (without any elaboration) that the university's concern about the potential disruptiveness of the speech was sufficient to outweigh Jeffries' interest in free speech.

The court did not mention academic freedom until the conclusion of its analysis. In a cryptic and enigmatic paragraph, the court noted that Jeffries' position as department chair was "ministerial," and "provided no greater public contact than an ordinary professorship," and that the university has not tried to silence "or otherwise limit [Jeffries'] access to the 'marketplace of ideas' in the classroom." Jeffries therefore did not have a viable "academic freedom" claim (52 F.3d at 14-15).

The *Jeffries* court's reasoning provides precious little guidance on how to make the various sensitive determinations required by its analysis. To reach its ultimate conclusion, the court had to determine that university officials' beliefs or predictions about the impact of Jeffries' speech were reasonable (rather than unreasonable), that the university officials took action against Jeffries because of the potential impact his speech would have on university operations (rather than because of their dislike of the content of the speech), and that the potential disruptiveness of the speech outweighed its First Amendment value (rather than the speech outweighing the potential disruptiveness). The opinion sets forth neither a methodology for making these determinations nor a substantive justification for the court's conclusions -- other than statements on the need to defer to the university.

It is especially difficult to determine how the *Jeffries* court distinguished between reasonable concerns about disruption and improper retaliatory motives. The problem seems to be with the court's formulation of the issues: the university could not constitutionally discipline Jeffries for the content of his speech, yet the university would not have had reason to discipline him without the speech. It was the speech that created the potential disruption. At most large universities, it would be hard to imagine "public concern" speech which would not stir any concerns regarding potential disruption of some university interest. The point at which mere offense at a particular message moves to a reasonable concern for university operations is not altogether clear. It is also not clear what types of impacts would be considered disruptions. Certainly the more extreme cases are imaginable: for example, the loss of substantial financial support directly attributable to the speech could be a disruption, but what of smaller financial losses, or losses attributable to a mix of factors? Or how about a small potential decline in student applications to a particular department? Or a student demonstration in reaction to the speech?

As used in *Jeffries*, the *Waters* concept of "potential" disruption seems to give the university wide discretion in controlling faculty/employee speech. Professor Jeffries may be said to have engaged in hate speech off campus, but why was it reasonable to believe that this speech would disrupt university operations? And if it was reasonable to conclude that Jeffries' speech would disrupt university operations, then would it be reasonable to believe that all unpopular speech has the similar potential to disrupt? Neither *Waters* nor *Jeffries* sets out a standard more specific than "reasonable belief."

Some structure could be added to the retaliation analysis if it were treated as analogous to the causation issues addressed in the *Mt. Healthy* line of cases (LHE 3d, Section 3.7.6. (pp. 328-330)). When the case concerns a single speech or a related pattern of speech activities, and the faculty member has been terminated for this speech, the court must still determine whether the disruptive (unprotected) or the nondisruptive (protected) portions of the speech are the cause of -- or motivation for -- the termination. If it is the nondisruptive speech that provides the cause, and if the employer is motivated by its disagreement with, or its taking offense at, this speech, then the termination would be an act of retaliation rather than an honest attempt to protect university interests from disruption. In *Waters*, Justice O'Connor, citing *Mt. Healthy*, used a similar analysis that provides helpful guidance for recognizing and resolving retaliation issues in cases like *Waters* and *Jeffries*. According to Justice O'Connor:

> Churchill has produced enough evidence to create a material issue of disputed fact about petitioners' actual motivation. Churchill had criticized the [hospital's] cross-training policy in the past; management had exhibited some sensitivity about the criticisms; Churchill pointed to some other conduct by hospital management that, if viewed in the light most favorable to her, would show that they were hostile to her because of her criticisms. A reasonable factfinder might therefore, on this record, conclude that petitioners actually fired Churchill not because of the disruptive things she said to Perkins-Graham, but because of nondisruptive statements about cross-training that they thought she may have made in the same conversation, or because of other statements she may have made earlier. If this is so, then the court will have to determine whether those statements were protected speech, a different matter than the one before us now [114 S.Ct. at 1891].

3.7.7. Protection of confidential academic information: "Academic freedom privilege." Another state supreme court has refused to create a privilege for "confidential" materials in a tenure file. In *State ex. rel. James v. Ohio State University*, 637 N.E.2d 911 (Ohio 1994), an assistant professor of geology requested copies of records in his tenure and promotion file and the files of other faculty as well. Although the dean informed James that he would give him a redacted version of the information in his tenure file, he rejected James' request for the contents of other faculty members' promotion and tenure files. He refused to give James the letter from his department chair regarding the chair's evaluation of James' performance, and also withheld the identity of individuals who had evaluated his work. James brought a mandamus action in the Supreme Court of Ohio.

The University asserted that the tenure file documents were protected by a confidentiality exception in the Ohio Public Records Act, and also claimed that disclosure would violate the University's academic freedom. The court rejected both defenses. To the first defense, the court noted that the confidentiality exemption in the public records law was limited to law enforcement investigatory records, not tenure files. Furthermore, said the court, the University had admitted in its tenure guidelines that internal and external letters of evaluation were not exempted from the public records act.

The court rejected the university's academic freedom claim, citing *University of Pennsylvania v. EEOC* (LHE 3d, pp. 334-335). Said the court,

> the issue is not whether the university is permitted to decide on academic grounds who receives promotion and tenure, but whether the records of those decisions are public records . . . it seems the antithesis of academic freedom to maintain secret files upon which promotion and tenure decisions are made, unavailable even to the person who is the subject of the evaluation [637 N.E.2d at 913].

The court granted the writ of mandamus.

Selected Annotated Bibliography

General

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Sec. 3.3 (Nondiscrimination in Employment)

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sexual harassment on campus. Includes a variety of model policies, EEOC policy guidelines, how to conduct an investigation (also available separately, see below), outlines and journal articles on the topic. A list of additional resources is also included. (This is a successor edition to the one listed in LHE 3d, p. 363.)

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Sec. 3.5 (Standards and Criteria for Faculty Personnel Decisions)

Finkin, Matthew W. (ed.) *The Case for Tenure*. Ithaca: Cornell University Press, 1996. Collects a variety of writings, by several eminent scholars, on academic freedom and tenure. Also includes selected court opinions and commentary on reductions in force, faculty retirement, and post-tenure review.

See the Baez and Centra entry and the Centra entry for Section 3.3.

Sec. 3.6 (Procedures for Faculty Personnel Decisions)

Copeland, John D. and Murray, John W., Jr. "Getting Tossed from the Ivory Tower: The Legal Implications of Evaluating Faculty Performance." 61 *Missouri L. Rev.* 233 (1996).

Sec. 3.7 (Faculty Academic Freedom)

"Academic Freedom Symposium," 22 *Wm. Mitchell L. Rev.* 333-576 (1996). Contains twelve commentaries preceded by a foreword by Neil Hamilton. Commentaries are: (1) Irving Louis Horowitz," "Contrasts and Comparisons Among McCarthyism, 1960's Student Activism, and 1990's Faculty Fundamentalism: Culture Politics and McCarthyism a Retrospective from the Trenches"; (2) Lionel Lewis, "McCarthyism and Academic Freedom: The 1950's and 1990's:

Similarities and Noteworthy Differences; (3) Wagner Thielens, "McCarthyism and Academic Freedom: Why Wasn't the Damage Worse? Some Answers from the Academic Mind"; (4) Seymour Martin Lipset, "1960's Student Activism and Academic Freedom: From the Sixties to the Nineties: A Double Edged Sword at Work"; (5) Todd Gitlin, "1960's Student Activism and Academic Freedom: Evolution of the Student Movement of the Sixties and its Effect"; (6) David Horowitz, "1960's Student Activism and Academic Freedom: Leftwing Fascism and the American Dream"; (7) Nathan Glazer, "1990's Faculty Fundamentalism and Academic Freedom: Academic Freedom in the 1990's"; (8) Daphne Patai, "1990's Faculty Fundamentalism and Academic Freedom: There Ought to be a Law"; (9) John Wilson, "1990's Faculty Fundamentalism and Academic Freedom: Myths and Facts: How Real is Political Correctness?"; (10) Jordan Kurland, "1990's Faculty Fundamentalism and Academic Freedom: Commentary on Buttressing the Defense of Academic Freedom"; (11) Neil Hamilton, "Buttressing the Defense of Academic Freedom: Buttressing the Neglected Traditions of Academic Freedom"; and (12) Rita Simon, "Buttressing the Defense of Academic Freedom: What Should Professors Do?"

IV

The College and the Students

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Sec. 4.1. The Legal Status of Students

4.1.1. The evolutionary process. Another stage in the evolution of students' legal status may be emerging. Developments at this new stage suggest a renewed emphasis on the *academic freedom* of students. In classical thought on academic freedom, the student's freedom to learn is clearly recognized and considered to be at least as important as the faculty member's freedom to teach. In more modern legal developments, courts have occasionally recognized the concept of student academic freedom; in *Piarowski v. Illinois Community College*, 759 F.2d 625, 629 (7th Cir. 1985), for instance, the court noted that the term academic freedom is "used to denote" not only "the freedom of the individual teacher" but also "the [freedom of] the student." But most academic freedom cases have been brought by faculty members, and most academic freedom rights that courts have protected have belonged to faculty members (see LHE 3d, Section 3.7).

Nonetheless, these faculty cases have had an important impact on the academic freedom of students. Students have an increasingly important stake in the disputes between faculty members and their institutions and indeed may have lodged the complaints which precipitated them (see, e.g., the *Cohen* case in this Supp., Section 3.7.2). A faculty member's actions may have hindered the students' freedom to learn; if the faculty member prevails in the dispute, student academic freedom may therefore diminish, and if the institution prevails it may be enhanced (see, for example, the *Bishop* case in LHE 3d, Section 3.7.2). Or a faculty member may have used methods or materials that intrude upon other student interests -- for example, their interests in fair grading practices or in freedom from sexual harassment; if the faculty member prevails, such student interests may receive less protection, and if the institution prevails they may receive more (see, e.g., the *Cohen* case in this Supp., Section. 3.7.2). Conversely, a faculty member may have acted in a way that guarded the students' freedom to learn or promoted other student interests; if the faculty member prevails in this situation, the students win too, and if the institution prevails they lose. Thus these cases have the potential to focus attention on student academic freedom and to protect student academic freedom, at least indirectly, by accepting or rejecting particular claims of faculty members.

Supplementing, and perhaps propelling, these developments is a recent U.S. Supreme Court pronouncement on academic freedom that focuses specifically on students. In *Rosenberger v. Rector and Visitors of University of Virginia*, 115 S. Ct. 2510 (1995) (discussed in this Supp., Sections 4.11.4

and 4.13.1), in protecting students' rights, the Court declared that dangers to free speech are:

> especially real in the University setting, where the State acts against a . . . tradition of thought . . . that is at the center of our intellectual and philosophic tradition . . . . In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn . . . . The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the nation's intellectual life, its college and university campuses [115 S. Ct. at 2520].

This pronouncement has the potential to influence the growth of protection for student academic freedom; future developments should be watched carefully.

4.1.3. The contractual rights of students. The recent case of *Kyriazis v. University of West Virginia*, discussed in this Supplement, Section 2.5.4, is an example of a contract of adhesion (LHE 3d, pp. 375-376) that a court invalidated as contrary to public policy. In particular, the court's opinion suggests factors relevant to determining whether the bargaining powers of the parties are substantially uneven. In *Kyriazis*, the court found that the university had a "decisive bargaining advantage" over the student because:

(1) the student had to sign the release as a condition of sports participation and thus had no real choice; (2) the release was prepared by counsel for the university, but the student had no benefit of counsel when he signed the release; and (3) the university's student code required students to follow the directions of university representatives.

Sec. 4.2. Admissions

4.2.4. The principle of nondiscrimination.

4.2.4.2. Sex. The litigation in the VMI case (*United States v. Commonwealth of Virginia*) has continued. After the trial judge approved the parallel program at Mary Baldwin College, a divided panel of the U.S. Court of Appeals for the Fourth Circuit affirmed, finding that providing single-gender education was a legitimate objective of the state, and that the leadership program at Mary Baldwin College was "sufficiently comparable" to the VMI program to satisfy the demands of the equal protection clause (44 F.3d 1229 (4th Cir. 1995)). The dissenting judge argued that the state's justification for excluding women from VMI was not "exceedingly persuasive," and that the women's leadership program at Mary Baldwin College did not provide substantially equal tangible and intangible educational benefits; he thus concluded that maintaining VMI as a single sex public institution violated the equal protection clause. A petition for rehearing *en banc* was denied.

The United States again asked the Supreme Court to review the appellate court's ruling, and this time the Court agreed. In a 7-1 decision (Justice Thomas did not participate), the Court ruled that VMI's exclusion of women violated the equal protection clause (116 S. Ct. 2264 (1996)). Since strict scrutiny is reserved for classifications based on race or national origin (see LHE 3d Section 4.2.4.1), the Court used intermediate scrutiny -- which Justice Ginsburg, the author of the majority opinion, termed "skeptical scrutiny" -- to analyze the state of Virginia's claim that single sex education provides important educational benefits. Reviewing the state's history of providing higher education for women, the Court concluded that women had first been excluded from public higher education, and then admitted to once all-male public universities, but that no public single sex institution had been established for women, and thus the state had not provided equal benefits for women. With regard to the state's argument that VMI's adversative training method provided important educational benefits that could not be made available to women and thus their admission would "destroy" VMI's unique approach to education, the Court noted that both parties had agreed that some women could meet all of the physical standards imposed upon VMI cadets. Moreover, the experience with women cadets in the military academies suggested that the state's fear that the presence of women would force change upon VMI was based on overbroad generalizations about women as a group, rather than on an analysis of how individual women could perform.

The Court then turned to the issue of the remedy for VMI's constitutional violation. Characterizing the women's leadership program at

Mary Baldwin College as "unequal in tangible and intangible facilities" and offering no opportunity for the type of military training for which VMI is famous, the Court stressed the differences between the two programs and institutions in terms of the quality of the faculty, the range of degrees offered, athletic and sports facilities, endowments, and the status of the degree earned by students. Criticizing the Fourth Circuit for applying an overly deferential standard of review that the Court characterized as one "of its own invention," the Court reversed its decision and held that the separate program did not cure the constitutional violation.

Chief Justice Rehnquist voted with the majority, but wrote a separate concurring opinion because he disagreed with Justice Ginsburg's analysis of the remedy. The "parallel program" at Mary Baldwin College was "distinctly inferior" to VMI, said Justice Rehnquist, but the state could cure the constitutional violation by providing a public institution for women that offered the "same quality of education and [was] of the same overall calibre" as VMI. Justice Rehnquist's opinion thus differs sharply from that of Justice Ginsburg, who characterized the exclusion of women as the constitutional violation, while Justice Rehnquist characterized the violation as the maintenance of an all-male institution without providing a comparable institution for women.

Justice Scalia, the sole dissenter, attacked the Court's interpretation of equal protection jurisprudence, saying that the Court had used a higher standard than the intermediate scrutiny that is typically used to analyze categories based on gender. Furthermore, stated Justice Scalia, since the

Constitution does not specifically forbid distinctions based upon gender, the political process, not the courts, should be used to change state behavior. Finding that the maintenance of single sex education is an important educational objective, Justice Scalia would have upheld the continued exclusion of women from VMI.

The litigation in *Faulkner v. Jones* (LHE 3d, p. 389) has also ended with the Citadel being ordered to admit women. The U.S. Court of Appeals for the Fourth Circuit ruled that the Citadel's refusal to admit women violated the Equal Protection Clause, and despite the state's promise to create a military-type college for women students, the court ordered the Citadel to admit women as students, 51 F.3d 449 (4th Cir.), affirming the order of the trial court (858 F. Supp. 522 (D.S.C. 1994)). Ms. Faulkner began attending classes at the Citadel, but withdrew after a few days; other women students are attending the college.

4.2.4.3. Disability. Litigation by disabled students challenging the denial of admission is expanding rapidly. An illustrative case is *Ohio Civil Rights Commission v. Case Western Reserve University*, 666 N.E.2d 1376 (Ohio 1996). The plaintiff, Cheryl Fischer, an applicant to Case Western Reserve's (CWR) medical school, had become totally blind during her junior year at CWR. CWR had provided Fischer with several accommodations as an undergraduate, including lab assistants and readers, oral examinations instead of written ones, extended exam periods, and books on tape. Fischer graduated *cum laude* from CWR.

All U.S. medical schools belong to the Association of American Medical Colleges (AAMC), which requires candidates for a medical degree to be able to "observe" both laboratory demonstrations and patient appearance and behavior. Despite Fischer's excellent academic record, CWR's medical school admissions committee determined that she did not meet the requirements of the AAMC because she was unable to see, and that she would be unable to complete the requirements of the medical school curriculum. Fischer reapplied the following year, and again was denied admission. She filed a complaint under the Ohio nondiscrimination law with the Ohio Civil Rights Commission, which found probable cause to believe that CWR had discriminated against Fischer. A county court affirmed the OCRC, but a state appellate court reversed, holding that CWR would be required to modify its program in order to accommodate Fischer's disability, which the law did not require. The Supreme Court of Ohio affirmed.

The court used a three-part test to determine whether the state law had been violated, an approach very similar to that under the Americans With Disabilities Act or the Rehabilitation Act (LHE 3d, pp. 390-391). The plaintiff had to demonstrate that he or she was a "handicapped person," that the individual was "otherwise qualified to participate in the [educational] program," and that the plaintiff "was excluded from the program on the basis of a handicap." Although the plaintiff met the first test, the court determined that Fischer was not "otherwise qualified" because the medical school would have been required to make "fundamental alterations in the essential nature of the program" (666 N.E.2d at 1384).

The Ohio Civil Rights Commission, which had found for Fischer, had placed great weight on the experience of a blind doctor who had received his training at Temple University Medical School. The court noted that he had been trained twenty years earlier, and that the faculty and students at the medical school had devoted a substantial amount of time to working individually with that student. Furthermore, the court rejected the findings of the Commission and trial court that, because Fischer could have completed the first two years of medical school training with minimal modifications of the program, that the more substantial modifications of the rest of the medical school program (such as having others read x-rays and patient charts, and waiving the requirement that she learn how to draw blood or insert an intravenous tube) would not be an undue hardship for CWR. A number of medical educators had testified that it would be impossible to modify the methods of training a medical student to accommodate a blind individual. In addition, said the court, requiring CWR to admit Fischer would impose an undue burden upon the faculty because of the extensive individual attention she would require from them.

Furthermore, said the court, the design of curriculum and teaching methods are matters of academic judgment, and deserving of deference "unless it is shown that the standards serve no purpose other than to deny an education to the handicapped" (666 N.E.2d at 1386). It was irrelevant, said the court, that Fischer intended to practice psychiatry rather than general medicine; the purpose of a medical school education was to produce general practitioners, not specialists.

The Ohio Civil Rights Commission had also ruled that CWR had a duty to contact Temple University and ascertain what accommodations it had provided its blind student. The court rejected the notion that a duty existed, stating that the AAMC standards for admission were bona fide, and the school was under no duty to go beyond those standards on Fischer's behalf.

* * * * *

The U.S. Court of Appeals for the Seventh Circuit has affirmed the denial of a preliminary injunction sought by a medical doctor with a visual impairment. The plaintiff had applied for a pediatric residency, but was rejected, in part because medical staff who had interviewed him had found him arrogant. In *Roth v. Lutheran General Hospital*, 57 F.3d 1446 (7th Cir. 1995), the court ruled that Roth's visual impairments did not meet the definition of disability in either the Rehabilitation Act or the ADA. The court stated that Roth's allegation that he could not work the long shifts required of residents did not necessarily render him disabled, just as an employee's inability to perform a particular job did not render that individual disabled for ADA purposes. Furthermore, because the committee that made selection decisions for medical residents was unaware of Roth's disability, Roth's claim that he was "regarded" as disabled also failed.

* * * * *

There have been further proceedings in the *Rothman* case (LHE 3d, p. 397). When the trial court considered the plaintiff's ADA and Rehabilitation Act claims after he had amended his complaint, it granted the law school's motion to dismiss on the grounds that most of the incidents on which he had grounded his claims occurred outside the statute of limitations period, and for those within the limitations period, there had been no violation of the laws and also no injury to Rothman, since he had graduated from law school, passed the Illinois bar exam, and was practicing law in that state. (*Rothman v. Emory University*, 1993 U.S. Dist. LEXIS 15190 (N.D. Ill. 1993)). In a later proceeding (1996 U.S.Dist. LEXIS 9220 (N.D. Ill. 1996), *affirmed*, 123 F.3d 4461 (7th Cir. 1997)), Emory University petitioned the court for summary judgment on its counterclaim for the amount of the plaintiff's student loans, which he had not repaid on the grounds that the university had discriminated against him. The court ruled that, since all of the plaintiff's claims had failed, judgment for the university for the plaintiff's unpaid student loans and some additional litigation costs was appropriate.

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For analysis of the legality of considering the fact that a student took a standardized college entrance examination under nonstandard conditions (typically because of the need for an accommodation), see Diana C. Pullin and Kevin J. Heaney, "The Use of Flagged Test Scores in College and University Admissions," 23 *J. of Coll. & Univ. Law* 797 (1997).

4.2.5. Affirmative action programs. A recent case has challenged the continuing vitality of Justice Powell's opinion in the *Bakke* case, and more generally has challenged the authority of colleges to use "diversity" as a rationale for considering race, gender, or other such characteristics as a "plus" factor in admissions. In *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), four individuals sued the state and the Law School under the equal protection clause of the Fourteenth Amendment, Sections 1981 and 1983 of the federal civil rights statutes (see LHE 3d, Section 4.2.4.1), and Title VI of the Civil Rights Act of 1964 (see LHE 3d, Section 7.5.2), claiming that they were denied admission on the basis of their race. The law school's affirmative action admissions program gave preferences to black and Mexican-American applicants only and used a separate committee to evaluate their applications. "Cutoff scores" used to allocate applicants to various categories in the admissions process were lower for blacks and Mexican Americans than for other applicants, resulting in the admission of students in the "minority" category whose college grades and LSAT scores were lower than those of some white applicants who had been rejected.

The trial and appellate courts used the strict scrutiny standard of review (see LHE 3d, Section 4.2.4.1), under which the defendant must establish (1) that it has a compelling interest that justifies the "discrimination," and (2) that its use of racial classifications is narrowly tailored to achieve its compelling interest. The law school had presented five justifications for its affirmative action admissions program, each of which, it argued, met the compelling state interest test: (1) to achieve the law school's mission of providing a first-class legal education to members of the two largest minority groups in Texas; (2) to achieve a diverse student body; (3) to remedy the present effects of past discrimination in the Texas public school system; (4) to comply with the 1983 consent decree with the Office of Civil Rights, U.S. Department of Education, regarding recruitment of black and Mexican American students; and (5) to comply with the standards of the American Bar Association and American Association of Law Schools regarding diversity.

Although the federal district court ruled that the portions of the law school's admissions program that gave "minority" applicants a separate review process violated the Fourteenth Amendment, that court had found, using the strict scrutiny standard, that two of the law school's justifications for the program (numbers 2 and 3) passed constitutional muster. Thus the trial court had held that the affirmative action plan furthered the compelling interest of attaining diversity in the student body, and that it served to remedy prior discrimination by the State of Texas in its entire public school system (including elementary and secondary schools). A three-judge panel of the appellate court rejected these justifications, finding that each failed one part of the strict scrutiny test.

The appellate panel first addressed the law school's argument that its admissions program was justified because it increased the diversity of the student body. It examined the opinion of Justice Powell in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) and his response to the university's argument that a race-conscious admissions program was necessary to ensure a diverse student body for the medical school, and that attaining a diverse student body was a compelling governmental interest. Although Justice Powell had stated that setting aside places in the medical school for which only minorities were eligible did not meet the strict scrutiny standard, he did state that attaining a diverse student body was a "constitutionally permissible goal for an institution of higher education" (438 U.S. at 311). The Fifth Circuit panel rejected Justice Powell's argument, however, stating that "achieving a diverse student body is not a compelling interest under the Fourteenth Amendment" (78 F.3d at 944), and noted that Justice Powell's opinion had never gained the support of a majority of the Supreme Court -- in *Bakke* or in any subsequent case. Furthermore, "no case since *Bakke* has accepted diversity as a compelling state interest under a strict scrutiny analysis" (78 F.3d at 944). Under recent Supreme Court precedent, said the court, racial classifications are only permissible for remedial purposes.

The court then addressed the district court's finding that the law school's admission program had a remedial purpose. Although the court recognized that the state of Texas had discriminated on the basis of race and ethnicity in its public education system, the law school's admission program was not designed to remedy that prior unlawful conduct because the program gave preferences to minorities from outside Texas and to some who had attended private school. Furthermore, said the court, in order for the admissions program to comply with Constitutional requirements, the law school would have had to present evidence of a history of its own prior unlawful segregation. "A broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny" (78 F.3d at 951). Once prior discrimination had been established, the law school would then have to trace present effects from the prior discrimination, to establish the size of those effects, and to develop a limited plan to remedy the harm. The "present effects" cited by both the law school and the district court--a bad reputation in the minority community and a perceived hostile environment in the law school for minority students--were insufficient, said the court, citing the Fourth Circuit's opinion in *Podberesky v. Kirwan* (see Section 4.3.4).

One appellate judge, although concurring in the result of the plaintiffs' constitutional claim, disagreed with the majority's statement that diversity could never be a compelling state interest. The lack of Supreme Court precedent on what constitutes a compelling interest and on whether diversity could provide such an interest in a public graduate school program, convinced this judge that the proper approach was to assume, without deciding, that diversity was a compelling state interest, and to consider whether the law school admissions program was narrowly tailored to achieve diversity. The judge's concern was that "diversity," as defined by the law school, covered only two groups: blacks and Mexican Americans. Limiting the program to these two groups, said the judge, "more closely resembles a set aside or quota system for those two disadvantaged minorities than it does an academic admissions program narrowly tailored to achieve true diversity" (78 F.3d at 966).

When the panel's opinion was announced, two other Fifth Circuit judges sought to have the case heard *en banc*, that is, by the full seventeen-judge appellate bench, despite the fact that neither party sought such review. A majority of the circuit judges voted not to hear the case *en banc* (84 F.3d 720 (5th Cir. 1996)). Two judges dissented vigorously from the denial of *en* *banc* review. Stating that the panel opinion "goes out of its way to break ground that the Supreme Court itself has been careful to avoid" (84 F.3d at 721), the dissenters accused the majority of "purport[ing] to overrule" the *Bakke* decision, calling the outcome "radical" and insisting that "every active judge on this court" should review the case because of it would "literally change the face of public educational institutions throughout Texas, the other states of this circuit, and this nation."

The dissenters were particularly outraged at the panel's dismissal of Justice Powell's decision in *Bakke*, stating that the panel had strung together "pieces and shards of recent Supreme Court opinions" dealing with a variety of affirmative action issues in noneducational settings, and had created "a gossamer chain which it proffers as a justification for overruling *Bakke*" (84 F.3d at 722). Characterizing the panel decision as "overreaching," a second judge reminded the court of the legacy of de jure segregation against black applicants, most notably in the *Sweatt v. Painter* litigation in which the U.S. Supreme Court found the admissions policies of the University of Texas Law School to violate the equal protection clause because they excluded blacks (339 U.S. 629 (1950)).

The United States Supreme Court rejected the law school's request that it review the Fifth Circuit's opinion (116 S. Ct. 2581 (1996)), a decision that leaves the legal status of racial or other minority preferences in public college admissions decisions in limbo. The decision of the Fifth Circuit is binding on public institutions in the states that comprise the Fifth Circuit-- Louisiana, Mississippi, and Texas -- but is not binding on public institutions in other states until and unless federal courts in other circuits, or the state courts themselves, make similar rulings. Given the Fourth Circuit's rejection of race-based financial aid at public institutions in *Podberesky* (this Supp., Section 4.3.4), it is possible that that circuit would adopt the reasoning of *Hopwood* should a relevant case reach that court.

Until other courts speak, it is inappropriate to declare nonremedial affirmative action in admissions "dead." Even though another federal circuit did recently rule that using race to choose between equally qualified teachers when making a layoff decision violated Title VII (see Section 3.4), that court limited its ruling to employment, stating specifically that *Bakke* did not apply in the employment setting.

Hopwood does, however, raise questions for public colleges outside the Fifth Circuit, and also for private colleges whose affirmative action programs could face challenges under Title VI (see Section 7.5.2), given *Bakke's* assertion that Title VI must be interpreted under equal protection clause principles. In response, colleges should review their affirmative action programs (in both admissions and financial aid) in light of the ongoing public dialogue about affirmative action, and in light of both prongs of the strict scrutiny test. Special attention should be given to any mechanisms that use separate committees, criteria, or cut-off scores for minority applicants; these mechanisms are clearly subject to legal challenge, as happened in *Hopwood*. If need be, colleges should also clarify exactly why and how they use racial preferences, how they identify present effects of past discrimination, how they define diversity (and why they define it this way), and the value that diversity adds to the academic environment. (For an excellent discussion of the pitfalls of limiting affirmative action programs to selected minority groups, see Gabriel Chin, "*Bakke* to the Wall: The Crisis of Diversity," 4 *William & Mary Bill of Rights Journal* 881 (1996)). Moreover, in light of *Hopwood*, colleges should give renewed attention to the possible use of "uniform" or "differential" systems of affirmative action as alternatives to "preferential" systems. These alternatives (discussed in LHE 3d, pp. 414-416) are much less vulnerable than preferential systems to the types of legal challenges made in *Hopwood*.

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The *Davis* case discussed in LHE 3d, pp. 413-414, concerned the validity of the affirmative action program at CUNY Law School at Queens College, not New York Law School. The pertinent sentence in LHE 3d should read, "A federal district court applied the teachings of *Bakke* and its progeny to evaluate the claim of a white male applicant to CUNY Law School at Queens College . . . ."

* * * * *

Adarand Constructors v. Pena, 115 S. Ct. 2097 (1995) (this Supp., Section 3.4), reaffirms and extends the reasoning in the *Croson* case (LHE 3d, p. 417). Taken together, these two cases suggest that attempts of public entities to remedy "societal discrimination," when there is no evidence that the organization itself has engaged in discrimination, will run afoul of the equal protection clause. Both *Adarand* and *Croson* were relied on in *Hopwood* (above).

4.2.6. Readmission. Students who seek readmission have typically been suspended or have withdrawn voluntarily, either because they have been unable to meet the academic requirements of the program, or because their conduct has not met the standards of the program. Students with disabilities may now be entitled to accommodations enabling them to succeed academically, or in terms of conduct, or to other protections assisting them in the readmission process.

In *Gill v. Franklin Pierce Law Center*, 899 F. Supp. 850 (D.N.H. 1995), Gill was dismissed from the law school at the end of his first year for failure to maintain satisfactory academic performance. He applied for readmission, but a faculty committee denied his request. He then filed a Rehabilitation Act claim, asserting that, in the personal statement that accompanied his application, he had stated that he was the child of an alcoholic parent. The court rejected Gill's argument that this statement put the law school on notice that he suffered from post-traumatic stress disorder, ruling that schools need accommodate only those disabilities of which they are aware.

Another student was successful in her claim that her denial of readmission was a violation of the Rehabilitation Act. In *Carlin v. Trustees of Boston University*, 907 F.Supp. 509 (D. Mass. 1995), a student enrolled in a graduate program in pastoral psychology requested a one-year leave of absence (later extended to two years) so that she could obtain treatment for a psychiatric disorder. Her academic performance prior to the leave had been satisfactory. The university denied her application for readmission, stating that she lacked the "psychodynamic orientation" for pastoral psychology. The student demonstrated that she was academically qualified and possessed the required clinical skills, and that the university's action was closely related to the university's knowledge that she had been hospitalized. The court denied the university's summary judgment motion.

For analysis of these and other cases, see Laura F. Rothstein, "Disability Discrimination in Higher Education: A Review of the 1995 Judicial Decisions," 23 *J. of Coll. & Univ. Law* 475 (1997).

Sec. 4.3. Financial Aid

4.3.4. Minority scholarships. The U.S. Court of Appeals for the Fourth Circuit has again overruled the district court in *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994). Despite the University's voluminous evidence of present effects of prior racial discrimination, the appellate court found that there was insufficient proof of such present effects to establish a compelling interest for the race-exclusive scholarships; furthermore, said the court, the program was not narrowly tailored, and thus failed both prongs of the strict scrutiny test.

The appellate court was sharply critical of all the findings made by the district court on the "present effects of prior discrimination." With respect to the district court's findings that the university has a poor reputation in the minority community and that there is a hostile racial environment on campus, the court ruled that these present conditions were not closely related to the

University's prior discrimination, but were more directly a result of present societal discrimination which cannot form the basis for a race-conscious remedy. Regarding the findings of low retention and graduation rates of minority students, the appellate court held that this condition was not directly linked to the University's prior discrimination, but was a result of economic and other unrelated factors. Similarly, regarding the underrepresentation of black students at the University, the court held that this condition could not be traced directly to the University's prior discrimination; other factors, such as student preference for predominantly-minority public colleges in Maryland, the decision to apply only to out-of-state colleges, or the decision not to attend college at all could explain all or part of the underrepresentation.

The court then criticized the University for arguing that its program was narrowly tailored to increase the number of black Maryland residents at the University because the Banneker program was open to out-of-state students. The court also rejected the trial court's finding that the program provided role models and mentors to other black students, noting that the Supreme Court had "rejected the role-model theory as a basis for implementing a race-conscious remedy" (38 F.3d 147 at 159). Added the court, "the program more resembles outright racial balancing than a tailored remedial program" (38 F.3d at 160).

Although the University had originally used two rationales -- remediation of its own prior discrimination and enhancement of student diversity -- for its race-conscious scholarship program, the trial court had addressed only the remediation rationale on remand. In *Podberesky I*, the appellate court had rejected diversity as a rationale for race-exclusive programs; thus, the University did not argue that rationale in *Podberesky II*, and neither the trial nor the appellate court discussed it in the second round of litigation.

The University appealed the ruling of the Fourth Circuit to the U.S. Supreme Court, but its petition was denied. Given that denial, the ruling in *Podberesky* applies directly only to those states in the Fourth Circuit (Maryland, North Carolina, South Carolina, Virginia, and West Virginia). Given its reliance on Supreme Court jurisprudence in *Croson* (LHE 3d, Section 3.4), and given the subsequent opinion of the U.S. Court of Appeals in the *Hopwood* case (see this Supp., Section 4.2.5), *Podberesky* signals that race- or gender-based scholarship programs at public colleges and universities may be in jeopardy, at least for institutions that have no history of de jure segregation or cannot present strong evidence of present effects of their own past discrimination; remedying societal discrimination, at least in the Fourth Circuit, is not a compelling interest sufficient to survive strict scrutiny.

Although *Podberesky*'s impact is geographically limited, it provides an opportunity for college administrators and faculty to review and reconsider their affirmative action programs. At this point, public institutions outside the Fourth Circuit, and private institutions (that face potential challenges under Title VI (see LHE 3d, Section 7.5.2)), do not need to change their policies to comply with a court decree that is not binding on them. However, institutions may wish to examine their minority scholarship programs to ascertain whether they are responsive to the issues raised in *Podberesky*. Are minority students underrepresented at the college in relation to their representation in the state (for public institutions) or the college's applicant pool (for private institutions)? Is the program based on a "remedy-for-discrimination" or a diversity rationale? If the former, is there strong evidence of present effects of past discrimination? If the latter, are "disadvantaged" nonminority students also eligible for the financial assistance under the program? How broad is the college's definition of "minority," and how does the college justify this particular definition?

Affirmative action doctrine is in flux, and college faculty and administrators are understandably perplexed about how they may lawfully maintain or increase the proportion of members of underrepresented groups in their student body. Given the recent judicial activity with regard to scholarships (*Podberesky*) and admission (*Hopwood*), re-examination of the purposes and effects of affirmative action in both these areas is well-advised.

4.3.5. Discrimination against nonresidents. In *Smith v. Board of Regents of the University of Houston*, 874 S.W.2d 706 (Ct. App. 1994), the plaintiff applied for the in-state tuition rate after living in Texas and attending the University of Houston for one year. He had moved to Texas in 1987 to commence study at the university's Law Center. The plaintiff was a full-time student who had declared his intent "to attend law school and live and work [in Texas] after graduation." During the school year he worked part-time for a law-firm in Houston; during the summers he worked full-time for the same firm. In addition, he was registered to vote in Texas, held a Texas drivers license, registered his car in Texas, and rented an apartment in Texas. The University denied his initial request for reclassification as an in-state student and every subsequent request he made before each of his remaining semesters at the University.

The Texas statute defines a nonresident student as "an individual who is 18 years of age or over who resides out of state or who has come from outside Texas and who registers in an educational institution before having resided in Texas for a 12-month period" (Tex. Educ. Code Ann. sec. 54.052(f)). There is a presumption in favor of this nonresident student classification "as long as the residence of the individual in the state is primarily for the purpose of attending an educational institution" (sec. 54.054). The regulations of the Coordinating Board, Texas College and University System, provide for a reclassification if the individual withdraws from school and resides in the state while gainfully employed for twelve months, but does not provide for this reclassification if the nonresident maintains his status as a full-time student.

The plaintiff argued that the Texas statute governing residency created an unconstitutional, irrebuttable presumption of nonresidency. Citing *Vlandis* (LHE 3d, pp. 434-435), the court rejected this argument:

> Unlike the Connecticut statute [at issue in *Vlandis*], the reclassification rules in Texas do not permanently "freeze" a student in a nonresident status based on the student's classification at the time of application to the university. A

> student may obtain reclassification in any number of ways. First, according to the policy on reclassification, a student will be entitled to reclassification if he or she withdraws from the University for a period of twelve months, and resides in Texas while gainfully employed. Secondly, the statute lists several factors that may result in reclassification. For example, a student may work full time in Texas, while enrolled as a student, or may purchase a homestead in Texas. Dependency on a parent or guardian who has resided in Texas for at least 12 months is also a factor that may result in reclassification. However, the factors listed in the statute are nonexclusive; therefore, presumably there are other circumstances that would result in reclassification. The rule in question also indicates that the "presumption of 'nonresident' is not a conclusive presumption," and may be overcome by showing facts or actions unequivocally indicative of a fixed intention to reside permanently in the state" [874 S.W.2d at 709].

That the university did not consider the plaintiff's statement of intent to remain in Texas to be sufficient proof of that intent was not problematic to the court: "to accept the plaintiff's argument would require the University to reclassify as a resident every student who, after attending the University for a year, makes a self-serving declaration that he intends to reside [in the state]."

The plaintiff also argued that the one-year waiting period infringed on his fundamental right to travel. Relying again on *Vlandis* as well as on *Starns v. Malkerson* (LHE 3d, p. 434), the court also rejected this equal protection claim:

> We find the reclassification statute distinguishable from either of the two situations in which a statute has been invalidated because it impinged upon the fundamental right to travel. The reclassification statute, and its one-year waiting period, does not involve a basic right or necessity, such as those found in the *Shapiro* line of cases. The right to receive a lower tuition rate at a state university cannot be equated to the right to receive welfare benefits, medical care, or the right to vote. Neither does the reclassification statute, on its face, seek to apportion or limit the benefits accorded to the citizens of Texas based on the length or timing of their residence. Instead, the reclassification policy seeks to establish which students are in fact bona fide residents of the state of Texas [874 S.W.2d at 711].

Because it found that the Texas statute and the regulations promulgated by the Coordinating Board do not create an irrebuttable presumption of nonresidency or an impingement on the right to travel, but instead, create a test of bona fide residency for purposes of tuition, the court rejected the claims of Mr. Smith and upheld the statute's constitutionality.

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The court's opinion in *Eastman v. University of Michigan*, 30 F.3d 670 (6th Cir. 1994), contains a useful discussion of the distinction between residency and domicile [30 F.3d at 672-73], as well as an implicit warning to drafters of residency regulations to exercise care in using these terms. The court also clarifies that, while durational residency requirements are valid under *Starns*, *Sturgis*, and *Vlandis* [LHE 3d p. 434], such a requirement would be unconstitutional if applied to a student *who has already established* *a bona fide domicile* (as opposed to a resident status) within the state [30 F.3d at 673-674].

4.3.6. Discrimination against aliens. There has been another appellate court decision in the *Leticia A. Bradford* litigation (LHE 3d, pp. 439-441). In a taxpayer action, *America Association of Women v. Board of Trustees of the California State University*, 38 Cal. Rptr. 2d 15 (1995), the court expressly disagreed with the reasoning of *Leticia A.*, affirmed that the *Bradford* decision "was correctly decided," and held that *Bradford* is "binding upon the California State University system."

4.3.7. Collection of student debts.

4.3.7.3. Debt collection requirements in federal student loan programs. There have been further proceedings in *Jackson v. Culinary School of Washington, Ltd* (LHE 3d, pp. 450-451). After the federal trial court rejected the former students' attempt to avoid their repayment obligation because of the alleged negligence of the Secretary of Education in supervising the quality of the institutions participating in the loan program, the former students appealed, and the U.S. Court of Appeals for the District of Columbia Circuit, ruling on procedural grounds, remanded the case to the trial court for dismissal (*Jackson v. Culinary School of Washington, Ltd.*, 27 F.3d 573 (D.C. Cir. 1994)). The U.S. Supreme Court vacated the D.C. Circuit's opinion and remanded it for the appellate court's consideration of the standard for reviewing a trial court's granting of declaratory relief (115 S. Ct. 2573 (1995)). On remand (59 F.3d 254 (D.C. Cir. 1995)), the appellate court determined that the students had no legally enforceable right against the Secretary of Education (upholding the trial court's ruling on the merits of the plaintiffs' federal claim); but remanded the issue of whether state law claims could be resolved by declaratory relief for further and more extensive consideration by the trial court.

Sec. 4.4. Support Services

In a recent case about birth control services, *Goehring v. Brophy*, 94 F. 3d 1294 (9th Cir. 1996), the U.S. Court of Appeals for the Ninth Circuit relied in part on the *Erzinger* case (LHE 3d p. 453) to uphold a University of California at Davis mandatory student registration fee used to subsidize a university health insurance program that covered the cost of abortion services. The university requires that all its graduate and professional students have health insurance. Students may acquire this insurance through the Graduate Student Health Insurance Program that provides a subsidy of $18.50 per insured student, per quarter, to reduce the cost of the premiums; funds generated by the mandatory students fees cover the cost of the subsidy. Students may opt out of this program by proving that they have health insurance from another provider.

The plaintiffs claimed that the university's insurance program violated their free exercise of religion because their sincerely held religious beliefs prevented them from subsidizing, or in any way financially contributing to, abortion services. In analyzing this claim the appellate court looked to the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (see this Supp., Section 1.6). Applying section (a) of the Act, the court held that the plaintiffs had failed to "establish that the university's subsidized health insurance program imposes a substantial burden on a central tenet of their religion." Several factors were critical to the court's conclusion:

> The plaintiffs are not required to purchase the University's subsidized health insurance -- undergraduate students are not required to have health insurance and graduate students may purchase insurance from any provider. Moreover, the student health insurance subsidy is not a substantial sum of money and the subsidy, taken from registration fees, is distributed only for those students who elect to purchase University insurance. Furthermore, the plaintiffs are not required to accept, participate in, or advocate in any manner for the provision of abortion services. Abortions are not provided on the University campus. Students who request abortion services are referred to outside providers [94 F.3d at 1300].

The court also concluded -- under section (b) of the Act -- that "even if the plaintiffs were able to satisfy the substantial burden requirement, the university's health insurance system nonetheless survives constitutional attack because it. . . is the least restrictive means of furthering a compelling government interest." Three "compelling" university interests supported the health insurance program: providing students with affordable health insurance that many would be unable to obtain if it was not available through the university; helping prevent the spread of communicable disease among students who must eat, sleep, and study in close quarters; and protecting students from the distractions of undiagnosed illnesses and unpaid medical bills that could interfere with their studies. Moreover, according to the court, the use of mandatory student fees to subsidize the insurance program was the "least restrictive means" of furthering these university interests. Relying on cases that rejected free exercise challenges to the federal government's collection and expenditure of tax dollars, the court reasoned that:

> [T]he fiscal vitality of the University's fee system would be undermined if the plaintiffs in the present case were exempted from paying a portion of their student registration fee on free exercise grounds. Mandatory uniform participation by every student is essential to the insurance system's survival . . . . There are few, if any, University funded activities to which one student or another would not object. [94 F.3d at 1301].

* * * * *

In another case involving health services and health insurance, *Lee v. Life Insurance Co. of North America, 23 F.3d 14 (1st Cir. 1994)*, the plaintiff-students challenged the university's imposition on undergraduate students of a *mandatory* fee for campus medical clinic services and a *mandatory* requirement that students carry supplemental health insurance fitting one of two coverage options specified by the university. The students argued that these requirements were invalid "tying arrangements" under the Sherman Antitrust Act (see generally LHE 3d, Section 7.2.13) and that they violated the federal Constitution's due process and equal protection clauses. The court rejected these arguments.

Sec. 4.5. Disciplinary and Grievance Systems

4.5.3. Judicial systems. The Supreme Court of Maine has addressed the issue of double jeopardy (LHE 3d, p. 460) in a situation where a student was subject to criminal and college penalties for an offense he committed. In *State of Maine v. Sterling*, 685 A.2d 432 (Me. 1996), Sterling, a football team member and recipient of an athletic scholarship, had assaulted a teammate on campus. The University held a hearing under the student conduct code, determined he had violated the code, and suspended him for the summer. In addition, the football coach withdrew the portion of Sterling's scholarship that covered room and board. Shortly thereafter, criminal charges were brought against Sterling. He pleaded not guilty, and filed a motion to dismiss the criminal charges, stating that the prosecution of the criminal complaint constituted double jeopardy because he had already received a penalty through the revocation of his scholarship. A trial court agreed, and dismissed the criminal proceedings. The State appealed.

The Supreme Court of Maine reversed, determining that the withdrawal of the scholarship was not a punishment because it was done to further the purposes of the student disciplinary code and to protect the integrity of the public educational system. The court explained that protection from double jeopardy was available if each of three requirements were met:

1. the sanction in each forum was for the same conduct;
2. the non-criminal sanction and the criminal prosecution were imposed in separate proceedings; and
3. the non-criminal sanction constitutes punishment [685 A.2d 434].

Although Sterling's situation satisfied elements one and two, the court refused to characterize the withdrawal of the scholarship as "punishment" because:

> Sterling, a student at a state-supported university, has no absolute right to obtain or retain an athletic scholarship. . . the scholarship is a privilege to which certain rights and responsibilities attach and which may be granted or withheld for valid reasons involving safeguarding the integrity of the institution [685 A.2d at 434].

Sec. 4.7. Grades, Credits, and Degrees

4.7.1. Awarding of grades and degrees. Students generally have not been successful in challenging specific grades. In *Altschuler v. University of Pennsylvania Law School*, No. 95-Civ-249, 1997 U.S. Dist. LEXIS 3248 (S.D.N.Y. March 21, 1997), for example, a law student who had just graduated challenged a failing grade he received in his first year. The grade resulted from the plaintiff's refusal to argue a "mock" case in a legal writing class on the grounds of moral and ethical objections. The plaintiff claimed that the professor "promised" him that he could argue and brief the opposite side but later retracted her promise. When the plaintiff refused to argue the assigned side, he received a failing grade in the course. The court dismissed all contract and tort claims based on the failing grade, finding:

> Professor Kelly's decision to breach her alleged promise to plaintiff was an academic decision about the proper requirements for a course. A faculty committee reviewed that academic decision and found that Professor Kelly properly exercised her discretion. Refusing to recognize plaintiff's claims seeking damages resulting from that decision serves the important function of protecting the faculty's professional judgment and autonomy [1997 U.S. Dist. LEXIS 3248 at *17].

Similarly, in *Disesa v. St. Louis Community College*, 79 F.3d 92 (8th Cir. 1996), the court rejected a student's challenge to a particular grade based on alleged "administrative deficiencies" in the testing process, including typographical errors in the materials and test questions, testing on materials not covered in class, an inability to review quizzes after they were graded, and arbitrary implementation of a class policy prohibiting erasure marks. Despite the plaintiff's argument that these were not "academic" decisions per se, the court applied a standard deferential to the college:

> Although [the erasure policy] and other alleged discrepancies may have affected Disesa's grade, we reject this attempt to bootstrap already-dismissed claims pertaining to the faculty

> administration of the class onto a remaining claim. These alleged procedural irregularities do not rise to a level sufficient to transport the grade outside the realm of academic decision [79 F.3d at 95].

Courts also have refused to review challenges to grades on the basis that such disputes are "frivolous." *See, e.g., Banks v. Dominican College*, 35 Cal. App. 4th 1545 (1995) (granting $18,000 in sanctions against the plaintiff); *Dilworth v. Dallas Community College Dist.*, 81 F.3d 616 (5th Cir. 1996) (finding there was no controversy sufficient to rise to the level of federal jurisdiction). But in *Sylvester v. Texas Southern University*, 957 F. Supp. 944 (S.D. Tex. 1997), a federal district court ordered a law student's grade changed to a "pass" from a "D" because the law school had not followed its procedures for adjudicating a grade dispute. Said the court:

> While it is true that the assignment of a test grade is a purely academic evaluation, Sylvester is entitled to due process in that evaluation. TSU is a state institution, funded by tax dollars and operating in the public interest. TSU must adhere to procedural requirements like other state institutions [957 F. Supp. at 947].

A faculty committee had twice violated the grade appeal policy; the professor in question had been given several opportunities to review Sylvester's work, but he refused to do so. The court criticized the institution and the professor in question for flouting the institution's own policies and procedures:

> Between active manipulation and sullen intransigence, the faculty, embodying arbitrary government, have mistreated a student confided to their charge. This violates their duty to conduct the public's business in a rationally purposeful manner [957 F. Supp. at 947].

* * * * *

In a breach of contract action, *Bilut v. Northwestern University*, 645 N.E.2d 536 (Ill. Ct. App. 1994), a doctoral student in speech and language pathology challenged the department's decision not to grant her an extension to complete her degree and alleged that the decision was based, at least in part, on her refusal of sexual overtures by her professor. The appeals court overturned the trial court's finding of fact that faculty of the private university had acted arbitrarily and in bad faith in denying the student the extension to complete her degree. In doing so, the appeals court found that many professors -- not just the alleged harasser--had seen problems with the dissertation proposal. The appeals court examined all of the statements made by faculty to the student concerning the deficiencies in her repeated proposal. Based on these evaluations, the court held that the plaintiff had not shown any right to an extension and refused to grant her relief in deference to the university's academic judgment.

* * * * *

The type of "bad faith" referred to in *Susan M.* (LHE 3d, pp. 473-474) and its progeny is often alleged in the context of a retaliation claim. A federal appeals court upheld a jury award of $180,000 against a college for harassing an honors student who testified on behalf of a professor in a reverse discrimination suit against the institution. In *Ross v. Saint Augustine's College*, 103 F.3d 338 (4th Cir. 1996), the court held that Leslie Ross "experienced a sudden reversal of fortune at Saint Augustine's College" when her grade point average fell from 3.69/4.0 to 2.2/4.0, the administration called a sudden student body meeting to impeach Ross as class president, and ultimately Ross was not able to graduate. Although the case involved only monetary damages, there is no indication that courts would afford deference to the academic decisions made under those circumstances.

* * * * *

For a discussion of many lower court cases involving challenges to adverse academic decisions, see Deborah L. Ford and John L. Strope, Jr. "Judicial Responses to Adverse Academic Decision Affecting Public Postsecondary Institution Students Since '*Horowitz*' and '*Ewing*'." 110 *Ed. Law Rep.* 517 (1996).

4.7.3. Sexual harassment by faculty. Lawsuits by students asserting claims against colleges for alleged harassment by faculty have skyrocketed in recent years. Several are discussed in this section for illustrative purposes.

Kadiki v. Virginia Commonwealth University, 892 F. Supp. 746 (E.D. Va. 1995), is an example of the use of a quid pro quo theory of sexual harassment brought under Title IX. One of the plaintiff's professors placed the plaintiff over his knees and spanked her repeatedly with his hand because her test score was unsatisfactory. He told the plaintiff that she could retake the same examination the next day, but that she should bring a hairbrush with her and that the spanking would be worse the second time. The plaintiff complained of her treatment, and the university immediately investigated her claims. The student was permitted to withdraw retroactively from the professor's class and re-enroll in another class the following term. In addition, the professor was sanctioned by the university. In response to criminal charges brought by the plaintiff, the professor was arrested and convicted of assault.

The court analyzed plaintiff's quid pro quo harassment claim and found that the professor's actions could be deemed sexual in nature. The court, as in *Lipsett* (LHE 3d, p. 478), concluded as a matter of law that the element of "notice" to the employer of the harassment is "automatically satisfied" when a professor engages in quid pro quo harassment; i.e. the university faced a strict liability standard:

> Indeed a professor is authorized by his educational employer to design the curriculum and manage the classroom. For example, a professor is responsible for selecting material for daily study, guiding class discussion, setting assignments, administering examinations and overseeing student behavior. Given these job characteristics, a professor is analogous to a work place supervisor, and knowledge of any quid pro quo harassment of a student by a professor should be imputed to his employer. Of course, such knowledge can only be imputed where the harassment occurs as part of the professor's responsibilities [892 F. Supp. at 752].

Therefore, the university was liable for the professor's actions under a respondeat superior theory.

Although the issue of whether a student may state a claim for hostile environment sexual harassment appears to be reasonably settled law, questions persist concerning the standard that the plaintiff must meet for establishing a hostile environment. Many federal appellate courts apply Title VII standards to hostile environment sexual harassment charges brought under Title IX. For example, in *Murray v. New York University College of Dentistry*, 57 F.3d 243 (2d Cir. 1995), a student sued the university based on the sexually harassing conduct of a patient in the dental clinic at the school. Part of the curriculum, and a requirement for the student's graduation, included participation in a dental clinic which provided services to the public. The court followed traditional Title VII principles in employment law cases and distinguished the standard of liability of an institution for quid pro quo harassment from the standard of liability for a hostile environment claim:

> Whether the harassing conduct of a supervisor or coworker should be imputed to the employer is determined in accordance with common-law principles of agency ... Thus, when a supervisor wields the authority delegated to him by an employer either (a) to condition "tangible job benefits" affecting an employee on the basis of the employee's acceptance or rejection of the supervisor's sexual demands ... or (b) to further the creation of a discriminatorily abusive environment, the supervisor's conduct is deemed to be that of the employer, and the employer's liability for that conduct is absolute ... In contrast, employer liability for a hostile environment created by coworkers, or by a low-level

> supervisor who does not rely on his supervisory authority in carrying out the harassment, attaches only when the employer has "either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it." An employer who has notice of a discriminatory abusive environment in the workplace has a duty to take reasonable steps to eliminate it [57 F.3d at 249 (citations omitted)].

The court concluded that the student's allegations were not sufficiently brought to the attention of the university. Furthermore, the court held that the complaints the student did make to those in authority were addressed immediately by telling the patient to stop his conduct.

Unlike the *Kadiki* district court, this court did not discuss overarching Title IX concerns nor suggest that liability under Title IX may be broader than the standard under Title VII. Instead, the *Murray* decision seems to suggest that the standard of liability for a hostile environment claim is coextensive with that under Title VII.

The U.S. Court of Appeals for the Second Circuit again addressed the issue of sexual harassment, this time in a Title IX hostile environment case brought by two students who alleged that a professor made sexually explicit remarks to them in his office. In *Kracunas and Pallett v. Iona College*, 119 F. 3d 80 (2d Cir. 1997), the court vacated the district court's award of summary judgment to the college and remanded for further proceedings. Referring to its earlier opinion in *Murray*, the court stated, "if [the professor] had supervisory authority over [the plaintiffs], and if he capitalized upon that authority to harass them, then Iona is liable for his conduct" (119 F.3d at 86)

The court found that the professor had the authority to assign, review, and grade the students' work, and also that he might be called upon to provide an employment recommendation. Despite the court's finding that "professors are not necessarily high in the hierarchy of college officials," the court found that the professor "was most certainly acting as Iona's agent in his role of college professor" and that "his blatant abuse of that authority, if proven, is sufficient under agency principles to impute liability" (119 F.3d at 87).

Given the institution's potential liability in claims of hostile, sexually discriminatory environment claims, a difficult question arises: how far may an institution go in limiting the classroom speech of one of its professors in order to prevent the creation of a hostile and sexually discriminatory environment? Several federal court opinions are discussed in this Supplement, Section 3.7.2, which address the conflicts between sexual harassment law and policy and the faculty member's right to academic freedom.

4.7.4. Students with disabilities. As with sexual harassment litigation, lawsuits filed by students who assert that their disabilities have not been accommodated by the college have mushroomed. Although courts have addressed claims involving a wide range of disabilities, the largest proportion involved alleged learning disabilities, and the provision of academic accommodations such as additional time on tests (or a different test format), waiver of required courses or pre-requisites, and, in some cases, waiver of certain portions of the curriculum. A recent survey found that three percent of full-time college students identified themselves as learning disabled (American Council on Education, cited in Tamar Lewin, "College Gets Tougher on Verifying Learning Disabilities of Aid Applicants," *New York Times*, February 13, 1996, A16). Illustrative cases are discussed below.

One area of contention between students and administrators is the type of documentation required for a student to establish the presence of a disability. In *Guckenberger v. Boston University*, 957 F. Supp. 306 (D. Mass. 1997), students asserted that Boston University's new policy requiring students to present recent (no more than three years old) documentation of learning disabilities was in violation of state and federal non-discrimination laws. They also challenged the evaluation and appeal procedure for requesting academic accommodations, as well as the university's "blanket prohibition" against course substitutions for mathematics and foreign language requirements. They also asserted that negative comments by the university's president about learning-disabled students had created a hostile learning environment for these students. The district court granted class action certification to the plaintiffs (all students with learning disabilities and/or attention deficit disorders currently enrolled at Boston University), thus avoiding mootness concerns. In addition, the court examined the viability of a "hostile academic environment" claim based on disability, concluding that such a claim was possible, but that the allegations of the plaintiffs' complaint fell short of such a claim. Although statements made by the university's president may have been offensive, the court considered the First Amendment concerns at hand and found that these remarks were not "sufficiently directed" towards the plaintiffs to constitute a hostile academic environment under Title VII standards.

In a subsequent opinion, the district court addressed the plaintiff's claims that the university violated the ADA and Section 504 by requiring students with learning disabilities to be retested every three years by a physician, a clinical psychologist, or a licensed psychologist; and by refusing to modify the requirement that students in the College of Arts and Sciences complete one semester of mathematics and four semesters of a foreign language. In *Guckenberger v. Boston University*, 974 F. Supp. 106 (D. Mass. 1997), the court ruled that the university's previous policy and its application had, in several respects, violated the disability discrimination laws. But the university had changed its policy and some of its practices after the litigation began, and some of those changes had cured the violations. The court ruled that requiring new documentation of a learning disability every three years, without regard to whether the updated information was medically necessary, violated the law because the requirements screened out or tended to screen out students with specific disabilities, and because the university did not demonstrate that the requirements were necessary to provide educational services or accommodations. The university's new policy permits a waiver of the three-year retesting regulation when medically unnecessary; this change, said the court, cured the violation.

The court also ruled that the university's requirement that it would accept documentation only from professionals with certain types of doctorates violated the law because professionals with other degrees (doctorates in education and certain master's degrees) were also qualified to assess individuals for learning disabilities. The court did note, however, that for the assessment of attention deficit disorder, it was appropriate to require that the assessor have a doctorate.

The university's decision to implement the policy in the middle of the academic year, without advance notice to affected students, also violated the ADA and Section 504, according to the court. Furthermore, the court ruled that the president and his staff, who lacked "experience or expertise in diagnosing learning disabilities or in fashioning appropriate accommodations" (974 F. Supp. at 118) had personally administered the policy on the basis of "uninformed stereotypes about the learning disabled." The university's new policy, which delegated the evaluation of accommodation requests to a licensed psychologist, cured that violation, said the court.

The court then turned to the students' claim that the university's outright rejection of all requests for substitution of certain courses was a denial of reasonable accommodation. The court agreed in principle that the university was not required to lower its academic standards or require substantial alteration of academic programs. In this case, however, the court found that the university had not even considered the alternatives suggested by the students (or any other alternatives) that would have provided an appropriate accommodation while maintaining academic standards and programmatic integrity. Said the court, "the University simply relied on the status quo as the rationale" (974 F. Supp. at 115). The court awarded damages for breach of contract and emotional distress to several of the students whose accommodations were delayed or denied because of the policy and its application by university officials.

As the court's lengthy opinion emphasizes, flexibility is of great importance in administering the process of obtaining and evaluating documentation of students' disabilities. Accommodation requests will need to be considered on a case-by-case basis. Determinations that accommodation requests would fall short of appropriate academic standards will need to be made, and evaluations of documentation presented by students with disabilities will need to be done, by professionals with appropriate credentials.

An early case involving accommodations for a disabled student was *Wynne v. Tufts University School of Medicine* (LHE 3d, p. 482). But the dissent rather than the majority opinion in *Wynne* was found persuasive in the recent case of *Ellis v. Morehouse School of Medicine*, 925 F. Supp. 1529 (N.D. Ga. 1996). The *Wynne* dissent, written by Chief Judge (now Supreme Court Justice) Breyer, would have applied the "arbitrary and capricious" standard used to defer to academic decisions even in disability cases. In *Ellis*, a medical student with dyslexia had been accommodated during the classwork portion of his medical studies and had performed satisfactorily, but when he began his clinical rotations, his performance was not satisfactory. He was dismissed from the program, and sued, claiming that the medical school had refused to accommodate his disability. The medical school asserted there was no reasonable accommodation which could be afforded the plaintiff that would allow him to meet the essential requirements of the medical school program because his performance in clinical rotations was so poor that he posed a risk to patient safety. The court relied on the professional judgment of the medical school faculty who dismissed the plaintiff, despite strong differences of opinion among the faculty themselves and the plaintiff's subsequent success in another medical school's program. The court held that the decision to terminate the plaintiff from the program for academic reasons, despite his disability, was not "so arbitrary or irrational as to not amount to an exercise of professional judgment." The court noted that the medical school was not required to fundamentally alter its program requirements and that the plaintiff could not have "extra time when called upon to diagnose medical problems in emergency or other situations." Thus, because no acceptable reasonable accommodation had been requested and none could be provided, the court dismissed the plaintiff's claims.

Another federal trial court has been less deferential to the "academic judgment" of a medical resident's professors. In *Lee v. Trustees of Dartmouth College*, 958 F. Supp. 37 (D.N.H. 1997), the plaintiff, a resident in neurosurgery, developed a disorder that mimicked the symptoms of multiple sclerosis (MS). Although the resident provided medical documentation that his condition was not MS, and also disputed the defendants' contention that he could not perform surgery, he was dismissed from the residency program. The court found that the medical school had not followed its own procedures, and that issues of material fact existed as to whether the defendants regarded the plaintiff as disabled, and as to whether he could perform the physical demands of the neurosurgical residency. The summary judgment motion of the defendants was denied.

Courts have generally ruled that, unless the college has knowledge of the student's disability, there is no duty to accommodate. For example, in *Goodwin v. Keuka College*, 929 F. Supp. 90 (W.D.N.Y. 1995), the plaintiff alleged that she had been improperly terminated from an occupational therapy program due to her mental disability. Under the school's policy, if a student failed to complete two field placements, he or she was automatically terminated from the program. The school policy also provided that a student would automatically fail a field placement if he or she left the assignment without prior permission. After failing one field assignment, passing another, and having a third incomplete, the plaintiff walked off her (fourth) field assignment after an argument with her supervisor. Almost three weeks later, the plaintiff sent a letter to the college explaining that she was seeking an evaluation to determine if she had a learning disability and requesting some accommodations. The college responded that she had been terminated from the program based on her actions. Although the plaintiff subsequently produced a psychiatric report that she did have a disability, the college refused to reinstate her. The court dismissed the plaintiff's suit, finding that the plaintiff could not make out a prima facie case under either the Rehabilitation Act or the ADA because she could not allege she was discharged on the basis of her disability; for a school to dismiss a student based on her disability, it must first be aware of that disability. In addition to simple knowledge, a court has ruled that the ADA requires the student to demonstrate that the university has actually denied a specific request for an accommodation. In *Tips v. Regents of Texas Tech University*, 921 F. Supp. 1515 (N.D. Tex. 1996), the court dismissed the plaintiff's claim because it found that she had not requested the accommodation. After examining the relevant legislative history and EEOC regulations, the court held that the duty to accommodate is triggered only upon a request by (or on behalf of) the disabled student. Because the plaintiff did not make her request for accommodation until after her dismissal from the program, the court held that the plaintiff could not make out a case of disability discrimination. A similar result occurred in *Gill v. Franklin Pierce Law Center*, discussed in this supplement, Section 4.2.4.3.

The ADA requires a college to evaluate a student's request for an accommodation, and to provide it if it is reasonable. In *Maczaczyj v. State of New York*, 956 F. Supp. 403 (W.D.N.Y. 1997), a federal trial court was asked to order Empire State College to permit the plaintiff to "attend" a required weekend class session by telephone from his home. The plaintiff, who suffered from panic attacks (a mental disorder), had rejected the offer of the program faculty to modify certain program requirements, such as excusing him from social portions of the sessions, providing an empty room for him to use when he became agitated, allowing him to bring along a friend of his choice, and to select the location on campus where the sessions would take place. The court credited the college's argument that attendance was required for pedagogical reasons, and that the course was not designed to be delivered through distance learning or telecommunication technologies. The court found that telephone "attendance" would not be the academic equivalent of the required class sessions, and denied the plaintiff's request.

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Although it is reasonably well settled that there is no individual liability under the ADA (see, for example, *EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995)), a federal court has held that a retaliation claim brought under the ADA can support an award of punitive and compensatory damages against the individual. In *Ostrach v. Regents of the University of California*, 957 F. Supp. 196 (E.D. Cal. 1997), a doctoral student was terminated from his employment with the University. The court vigorously disputed the reasoning behind binding case precedent barring individual liability under Title VII (and by analogy under the ADA), but reluctantly held that it prevented the plaintiff from obtaining damages from the individual defendants based on their alleged discriminatory acts. However, after examining the statutory language and the *Franklin* case (LHE 3d, pp. 816-817), the court held that the plaintiff could sue the individuals for the damages allegedly caused by their retaliation against him because he complained of their discrimination.

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A federal appellate court has ruled that an HIV-infected medical resident may be suspended from surgery. In *Doe v. University of Maryland Medical System Corporation*, 50 F.3d 1261 (4th Cir. 1995), a third-year neurosurgical resident was stuck with a needle while treating an HIV-positive patient, and the resident later tested HIV-positive himself. The hospital permanently suspended Doe from surgical practice, offering him residencies in pathology and psychiatry. Doe rejected these alternatives, and filed claims under the Rehabilitation Act and the ADA. The court ruled that he was not otherwise qualified because he posed a significant risk to patient safety that could not be eliminated by reasonable accommodation.

Sec. 4.8. Procedures for Suspension, Dismissal, and Other Sanctions

4.8.2. Public institutions: Disciplinary sanctions. A case brought against Indiana University is illustrative of both notice and hearing aspects of student discipline. In *Reilly v. Daly*, 666 N.E. 2d 439 (Ind. App. 1996), a student who was dismissed from the university for cheating claimed a variety of constitutional violations.

Therese Reilly was a student at Indiana University School of Medicine. During the final examination in her Medical Pharmacology course, two of the course professors noticed that Reilly was acting in what they believed to be a suspicious manner. They suspected she was attempting to copy from another student's test paper. Halfway through the test, one of the professors asked that student to cover his test paper more thoroughly. The "suspicious" behavior on Reilly's part ceased when the other student left the room.

The professors compared the test papers of the two students; the first seven pages were nearly identical, but the similarities ceased halfway through the exam. A statistician advised the professors that there was one chance in

200,000 that Reilly and the other student could have had the same incorrect answers on their multiple choice questions without cheating having occurred. The professors gave Reilly an F on the exam, sending her a letter that outlined the suspicious behavior and the statistical comparisons. Reilly sent a letter of protest to the professors, who reaffirmed their decision. Reilly was permitted to bring a lawyer with her to meet with the professors to rebut their charges. As a result of that meeting, the professors had a second statistical analysis run on the two test papers, which resulted in a lower, but still significantly high probability that the similarities were not a result of chance.

Because Reilly had received one other grade of "F," also as a result of cheating on a final exam in another course, she was informed that she was entitled to a hearing before the Student Promotions Committee prior to dismissal from medical school. She was permitted to be assisted by her attorney, and was allowed to present her version of the facts. The committee voted to recommend her dismissal. Reilly appealed the committee's decision, but they reaffirmed their recommendation. The dean then dismissed Reilly from medical school.

Reilly filed a lawsuit, alleging that the university denied her due process and equal protection. The alleged due process violations were her lack of opportunity to question the course professors at the hearing, the vagueness of a rule that forbids "the appearance of cheating," and the committee's failure to use the "clear and convincing" standard of proof. The court did not address whether the dismissal was on academic or disciplinary grounds because it found that the medical school had afforded her sufficient due process for either type of dismissal. Even had the dismissal been on disciplinary grounds, said the court, she had no right to formal cross-examination of her accusers; she was fully aware of the evidence against her and had been given the opportunity to discuss it with the professors.

The vagueness claim was dealt with by noting that Reilly had been dismissed because the committee had determined that she cheated, so the "appearance of cheating" rule was irrelevant to her dismissal. And the court stated that only "substantial evidence" was necessary to uphold the dismissal; the committee was not required to use the "clear and convincing" standard of proof.

Reilly also challenged her dismissal on equal protection grounds, asserting that students in other units of the university were given certain rights that she, as a medical student, was not, including the right to cross-examine witnesses and the use of the clear and convincing evidence standard. The court noted that the equal protection clause does not require that all persons be treated identically, but only that an individual be treated the same as "similarly situated" persons. Reilly was treated the same as other medical students, said the court; she was not "similarly situated" to undergraduates or students in the law school. The court affirmed the trial court's denial of the preliminary injunction sought by Reilly.

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A federal district court and a state supreme court have rejected the contentions of defendant colleges that they were not required to follow their own disciplinary procedures in cases of expulsion for "academic misconduct." In *Siblerud v. Colorado State Board of Agriculture*, 896 F. Supp. 1506 (D. Colo. 1995), Robert Siblerud, a former student who was trying to complete his dissertation, was dismissed from the Ph.D. program in physiology after he twice submitted manuscripts to journals that included a footnote in which he represented himself as a student. He was not given a hearing, but was permitted to appeal his dismissal by using the graduate school's grievance process. Although the graduate school committee was divided, the provost affirmed the dismissal. Siblerud asserted that his dismissal was disciplinary, not academic, and the trial court agreed. Although the case was dismissed because the claim was time-barred, the judge criticized the university's handling of the situation and characterized it as a disciplinary action, rather than one sounding in academic judgment.

In *University of Texas Medical School at Houston v. Than*, 901 S.W.2d 926 (Tex. 1995), the Texas Supreme Court rejected the University's claim that its dismissal of a student for cheating on an examination was an academic decision. Although Than was given a hearing that met due process requirements, at the end of the hearing the hearing officer and the medical school official who presented the case against Than inspected the room in which the test had been administered. Than was not allowed to accompany them; he asserted that this decision was a denial of due process. The court said:

> UT argues that Than's dismissal was not solely for disciplinary reasons, but was for academic reasons as well, thus requiring less stringent procedural due process than is required under *Goss* for disciplinary actions. . . This argument is specious. Academic dismissals arise from a failure to attain a standard of excellence in studies whereas disciplinary dismissals arise from acts of misconduct . . . Than's dismissal for academic dishonesty unquestionably is a disciplinary action for misconduct [901 S.W.2d at 931].

The court ruled that the exclusion of Than from the post-hearing inspection violated his procedural due process rights.

For further analysis of these and other cases, and suggestions for avoiding judicial criticism of an institution's actions, see Gary Pavela, "Disciplinary and Academic Decisions Pertaining to Students: A Review of the 1995 Judicial Decisions," 23 *J. of Coll. and Univ. Law* 389 (1997).

4.8.3. Public institutions: Academic sanctions. *Ewing* (LHE 3d, pp. 467-468) continues to persuade courts to employ a deferential standard of review when academic dismissals are at issue. In *Frabotta v. Meridia Huron Hospital School*, 657 N.E.2d 816 (Ohio Ct. App. 1995), a nursing student who was dismissed six days prior to graduation challenged her dismissal as arbitrary and capricious and a violation of her due process and equal protection guarantees. The court, citing *Ewing*, stated:

> Courts should not intervene in academic decision-making where a student is dismissed unless the dismissal is clearly shown to be arbitrary and capricious . . . In this case, Frabotta

> was dismissed because of her failing performance in the clinical portion of her Nursing 303 class . . . Thus, there is no dispute that Frabotta's dismissal was clearly an academic decision. It being an academic decision, Frabotta had the burden of proving that the decision was arbitrary and capricious [657 N.E.2d at 819].

Simply because the student believed she deserved a second chance, or an additional opportunity to improve her performance, did not render the school's actions either arbitrary or capricious, according to the court, nor was the school's refusal to give her additional opportunities to improve her performance a denial of due process. The student had been warned of her deficiencies, said the court; even though the school cut short her opportunity to improve her performance, that was a subjective, academic judgment which the court could not overturn subject to clear evidence of bad faith on the part of the instructor.

4.8.4. Private institutions. The Supreme Court of Iowa was faced with the need to determine whether a medical student's dismissal for failure to successfully complete his clinical rotations was on academic or disciplinary grounds. In *Lekutis v. University of Osteopathic Medicine*, 524 N.W.2d 410 (Iowa 1994), the student had completed his coursework with the highest grades in his class, and had scored in the 99th percentile in standardized tests. The student, however, had serious psychological problems, and had been hospitalized several times while enrolled in medical school. During several clinical rotations, his instructors found his behavior bizarre, inappropriate, and unprofessional, and gave him failing grades. He was eventually dismissed from medical school.

The court applied the *Ewing* standard (LHE 3d, pp. 467-468), reviewing the evidence to determine whether the medical school faculty "substantially departed from accepted academic norms [or] demonstrated an absence of professional judgment" (524 N.W.2d at 413). Although some evaluations had been delayed, the court found that the staff did not treat the plaintiff in an unfair or biased way, and that there was considerable evidence of his inability to interact appropriately with patients and fellow medical staff.

* * * * *

A federal appellate court has rejected a student's claim that a private college's disciplinary proceedings violated the laws against race discrimination, but has allowed the student to proceed on his Title IX sex discrimination claim (LHE 3d, Section 7.5.3.) and state tort claims. In *Yusuf v. Vassar College*, 35 F.3d 709 (2d Cir. 1994), the student alleged that a disciplinary hearing was flawed in several significant aspects and that the penalty he received for a sexual harassment charge was more severe than his male roommate received for assaulting Yusuf.

Yusuf alleged that he had been the victim of an unprovoked assault by his roommate, Weisman. Weisman was charged with a violation of the college's student conduct code, and was brought before the College Regulations Panel. He was found to have committed the assault, but was given a suspended suspension. Prior to the hearing, Weisman and his girlfriend, Kapur, tried to persuade Yusuf to drop both the college charges and the criminal charges against Weisman. When Yusuf refused, he alleged, Kapur filed charges of sexual harassment against him.

Yusuf was then required to appear before the College Regulations Panel, which found him guilty of harassment and recommended a one-semester suspension, which was carried out. Yusuf alleged that several actions by college administrators demonstrated that males accused of sexual harassment are treated more harshly than women. For example, he was not informed in writing of the details of the charges against him, he was not permitted to call several key witnesses in his favor, and the hearing was held at a time when his primary witness was away from campus. Furthermore, the panel did not allow the introduction of exculpatory information, and the administrator in charge of the proceedings terminated the hearing before Yusuf had presented all of his evidence. Furthermore, alleged Yusuf, there was a history at the college of males who had been accused of sexual harassment consistently being found guilty.

Although the court rejected Yusuf's claim that the more lenient sanction given Weisman was grounded in the differences in the races of the two students, it found his claim of gender discrimination potentially plausible. If Yusuf's gender was a motivating factor in the college's decision to discipline, said the court, then he may have stated a Title IX violation. The court explained:

> Plaintiffs attacking a university disciplinary proceeding on grounds of gender bias can be expected to fall generally within two categories. In the first category, the claim is that the plaintiff was innocent and wrongly found to have committed an offense. In the second category, the plaintiff alleges selective enforcement. Such a claim asserts that, regardless of the student's guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the student's gender [35 F.3d at 715].

The court took pains to distinguish a situation in which the student merely asserts that the outcome was incorrect, unless the evidence of innocence were "overwhelming." But an allegation of selective enforcement of a disciplinary code, said the court, with some evidence that males "invariably lose" when charged with sexual harassment, could provide the type of "verifiable causal connection similar to the use of statistical evidence in an employment case" (35 F.3d at 716).

Sec. 4.9. Student Protest and Demonstrations

4.9.4. Court injunctions and criminal prosecutions. The United States Supreme Court has now provided substantial guidance on how to analyze the validity of court injunctions against protest activities. In *Schenck v. Pro-Choice Network of New York*, 117 S. Ct. 855 (1997), and its predecessor case *Madsen v. Womens' Health Center*, 512 U.S. 753 (1994), the Court considered the validity of multi-faceted injunctions limiting protest activity in the vicinity of abortion clinics. In each case, the Court acknowledged that the challenged injunctions were restraints on speech-related activity and thus subject to First Amendment analysis. Also in both cases, however, the Court acknowledged that the particular injunctions at issue were content-neutral rather than content-based injunctions and thus not subject to "strict scrutiny" review. Generally, content-neutral regulations of speech are subject to a less rigorous "time, place, and manner" scrutiny. But in *Madsen* the Court determined for the first time that its "standard time, place, and manner analysis is not sufficiently rigorous" for purposes of reviewing content-neutral injunctions. The Court thus established a new test to apply: "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest" (*Madsen*, 512 U.S. at 765). The *Schenck* case reaffirms and applies this same test, using it (as the *Madsen* Court did) to invalidate some parts of the injunction at issue but uphold other parts.

The protest activities in *Schenck* included what the lower court called "constructive blockades" as well as "sidewalk counseling." The blockades, as described by the lower court, consisted of "demonstrating and picketing around the entrances of the clinics, and . . . harassing patients and staff entering and leaving the clinics" (117 S.Ct. at 861). Included in the blockades were "attempts to intimidate or impede cars from entering the parking lots, congregating in driveway entrances, and crowding around, yelling at, grabbing, pushing, and shoving people entering and leaving the clinics (117 S.Ct. at 861). The sidewalk counseling was "aggressive" and included "occasional shoving and elbowing, trespassing into clinic buildings to continue counseling . . . and blocking of doorways and driveways" (117 S.Ct. at 861).

Two types of injunctive provisions were the particular focus of the *Schenck* Court's attention: the "fixed buffer zones" provisions and the "floating buffer zones" provisions. The fixed zones provisions banned the protesters from demonstrating within fifteen feet of the driveways and doorways of the abortion clinics. The floating zones provisions banned the protesters from approaching within "a normal conversational distance" of individuals arriving at or departing from the clinics in order to leaflet or otherwise communicate messages to them. Using the new test from *Madsen*, the *Schenck* Court invalidated the floating buffer zones, even though they prohibited "classic forms of speech," because "they burden more speech than is necessary to serve the relevant governmental interests" (117 S.Ct. at 867). Focusing on the dynamics of ingress to and egress from the clinics, the Court reasoned that, given the nature of the floating zones, "it would be quite difficult for a protester who wishes to engage in peaceful expressive activities to know how to remain in compliance with the injunction. This lack of certainty leads to a substantial risk that much more speech will be burdened than the injunction by its terms prohibits (117 S.Ct. at 867). For the same reasons, the *Schenck* Court also invalidated the injunction provisions creating floating buffer zones around vehicles entering and leaving the clinic facilities.

In contrast, the Court in *Schenck* upheld the fixed buffer zones provisions because "[T]hese buffer zones are necessary to ensure that people or vehicles trying to enter or exit the clinic property or clinic parking lots can do so . . . . [T]he record shows that protesters purposefully or effectively blocked or hindered people from entering and exiting the clinic doorways, from driving up to and away from clinic entrances, and from driving in and out of clinic parking lots" (117 S.Ct. at 868).

Many of the dynamics of entry and exit described by the Court may be similar to those for entering and leaving campus buildings, roadways, parking areas, and other facilities. Much campus protest activity -- or other expressive activity such as religious proselytizing -- may also use tactics or have effects similar to those of the blockades and sidewalk counseling in *Schenck*. The *Schenck* and *Madsen* opinions, therefore, may often be the primary guidance for both public and private institutions considering injunctions as a means to manage campus protests and demonstrations.

Sec. 4.11. Student Organizations

4.11.1. Right to organize. Although students at public colleges typically have a constitutionally-protected right to organize, such is not the case for students at a private college. In *Jackson v. Strayer College*, 941 F. Supp. 192 (D.D.C. 1996), *affirmed*, 1997 WL 411656 (D.C. Cir. 1997), the court dismissed a student's constitutional claims based on allegations that the defendants obstructed the plaintiff's efforts to form a student government at a private college. The court held that federal constitutional protections do not extend to protect a right to vote in a private college student government election unless some other federal right has been denied or abridged. In the absence of "state action" (see Section 1.5.2.), the actions alleged to have been taken could not constitute a First Amendment violation. Furthermore, the court held that plaintiff's First Amendment "peaceful assemblage" claim failed because the college is private property upon which the plaintiff has no constitutional right to peacefully assemble.

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The suggested "exception" to the principle espoused in *Gohn* has been discredited by the U.S. Supreme Court's reversal of the Fourth Circuit's decision in *Rosenberger* (this Supp., Section 4.11.4).

* * * * *

The attempt of the Alabama legislature to deny funding to organizations, including student groups, that advocate on behalf of homosexuality has been invalidated. In *Gay Lesbian Bisexual Alliance v. Sessions*, 917 F. Supp. 1548 (M.D. Ala. 1996), *affirmed sub nom.*, 110 F.3d 1543 (11th Cir. 1997), the court addressed a law passed by the Alabama state legislature to "suppress the official presence and voice of gay and lesbian groups at state supported colleges and university campuses" [917 F. Supp. at 1550]. That law declared:

> No public funds or public facilities shall be used by any college or university to, directly or indirectly, sanction, recognize, or support the activities or existence of any organization or group that fosters or promotes a lifestyle or actions prohibited by the sodomy and sexual misconduct laws [§ 16-1-28(a) Alabama Code 1975 (Michie 1995)].

The law also decreed:

> No organization or group that receives public funds or uses public facilities, directly or indirectly, at any college or university shall permit or encourage its members or encourage other persons to engage in any such unlawful acts or provide information or materials that explain how such acts may be engaged in or performed [Alabama Code § 16-1-28(b)].

In the face of threats of prosecution under this law, the administration at the University of South Alabama denied funding and withheld recognition of the Gay and Lesbian Bisexual Alliance. Represented by the American Civil Liberties Union, the Alliance sued both the dean of the university and the state attorney general. The state attorney general defended the constitutionality of the law, both as written and as applied to the student organization in this case.

The district court held the entire law unconstitutional, despite subsection (c) of the law which provided that the law "shall not be construed to be a prior restraint of the first amendment protected speech" and "shall not apply to any organization or group whose activities are limited solely to the political advocacy of a change in the sodomy and sexual misconduct laws of this state. The court relied almost exclusively on the U.S. Supreme Court decision in *Rosenberger v. Rector & Visitors of the University of Virginia*, (discussed in this Supplement, Section 4.11.4). Unlike *Rosenberger*, this case did not involve difficult First Amendment distinctions between religious viewpoints and evangelism, nor did it involve establishment clause issues. Consequently, the court held the Alabama statute to be "naked viewpoint discrimination" that violated the free speech clause. As the court explained:

> The statute therefore attempts to impose on a group that receives public funds or uses public facilities the State's viewpoint regarding certain lifestyles and actions and to require that that group and its members conform their speech to this viewpoint. The statute further attempts to dictate the information, and even the actual words, that may not be used to convey an idea or belief. This too is viewpoint discrimination. A viewpoint may include not only *what* a person says but *how* she says it. For example, as the defendants admitted at oral argument, the State does not seek to ban discussion about sexually transmitted diseases; rather, it only seeks to limit how such diseases may be discussed. In other words, the State seeks to impose its viewpoint on how the discussion may proceed [917 F. Supp. at 1554 (emphasis in the original)].

The district court was not persuaded by the state's argument that it was simply preventing the likelihood of crime, i.e., homosexual acts. Since the Gay Lesbian Bisexual Alliance "has not fostered or promoted the violation of state sodomy laws," the application of the statute to that group was unconstitutional. Quoting from *Healy v. James* (LHE 3d, pp. 500-501), which in turn quoted *Brandenberg* (LHE 3, pp.518), the court emphasized:

> "The critical line heretofore drawn for determining the permissibility of regulation is the line between mere advocacy and advocacy 'directed to inciting or producing imminent

> lawless action and... likely to incite or produce such action'" [917 F. Supp. at 1556].

The statute on its face did not draw this distinction between mere advocacy and unlawful acts. "Indeed, it attempts to draw within its reach even a 'lifestyle,' which in some instances could require little more than a frame of mind" (917 F. Supp. at 1556-1557). Furthermore, the court rejected defendants' contention that the State should not be required to fund viewpoints with which it disagreed, on the basis that the U.S. Supreme Court had rejected the same argument in *Rosenberger*.

In a separate reported decision, the district court reiterated and expounded upon its prior holding and refused to limit its prior judgment or to stay the decision pending appeal. *Gay Lesbian Bisexual Alliance v. Sessions*, 917 F. Supp. 1558 (M.D. Ala. 1996).

The Alabama Attorney General appealed, and the U.S. Court of Appeals for the 11th Circuit affirmed the district court in all respects (*Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997)). Relying heavily on *Rosenberger*, and reminding the parties that that case had also arisen in a collegiate setting, the appellate court characterized the funding of student organizations at the University of South Alabama (USA) as a limited public forum, stating:

> [The law] as applied to GLBA clearly runs afoul of . . . *Rosenberger*. USA's limited public forum does not prohibit discussion of the sodomy or sexual misconduct laws in general. Rather, based on [the law], USA prohibited funding

> to GLBA based on the Attorney General's unsupported assumption that GLBA fosters or promotes a violation of the sodomy or sexual misconduct laws. The statute discriminates against one particular viewpoint because state funding of groups which foster or promote compliance with the sodomy or sexual misconduct laws remains permissible. This is blatant viewpoint discrimination [110 F.3d at 1549].

Given its detailed application of *Rosenberger*, the reasoning of this case may prove extremely useful to student groups denied funding on all but the most obvious content -- and viewpoint -- neutral grounds.

4.11.2. Right not to organize. Dicta in a concurring opinion by Justice O'Connor in *Rosenberger* (this Supplement, Section 4.11.4) suggests that opt-out provisions may be necessary at publicly-funded institutions to avoid a plethora of free-speech challenges to the payment of student activity fees. Two courts have recently considered opt-out provisions.

In *Cortes v. State of Florida, Board of Regents*, 655 So.2d 132 (Fla. Ct. App. 1995), students enrolled at Florida State University challenged the "negative check off" policy adopted by the university. Students who did not wish a portion of their student fee money to be allocated to the Public Interest Research Group (PIRG) were required to check a box on their registration card. The Florida Administrative Code provided that the president of each public institution in Florida could determine whether a "positive checkoff" or "negative checkoff" system should be used at that institution. The students argued that this state rule was an improper delegation of authority to the presidents and provided no standards for determining which system should be selected. The also asserted claims under the state constitution.

The court agreed that this rule permitted standardless discretion, but said that only the negative checkoff system could result in potential harm to the students. The court then "deleted" the negative checkoff provision from the rule , but held that the rule could permit a positive checkoff system (whereby if the student wished a portion of the fee to go to PIRG, the box would have to be checked). Given that outcome, the court denied the students' constitutional claims.

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A federal district court in Wisconsin has cited Justice O'Connor's concurring opinion in *Rosenberger* with respect to the opt-out provision as support for the proposition that the *Abood* doctrine (LHE 3d, p. 187) is applicable to the mandatory student fee issue. In *Southworth v. Grebe*, 1996 U.S. Dist. LEXIS 20980 (W.D. Wis. 1996), three law school students brought an action alleging that the University of Wisconsin - Madison's imposition of mandatory student fees was unconstitutional. The students alleged that the fees unlawfully compelled them to fund ideas and political agendas with which they did not agree, basing their claims on the free speech and free exercise clauses of the federal Constitution and on the Religious Freedom Restoration Act. After detailing the exact fee mechanism in use by the university and analyzing the prior case law, the court followed the *Smith* decision (LHE 3d, pp. 521-522) and required an opt-out provision. The court reasoned:

> Even though the existence of these student organizations on the UW-Madison campus contributes to one of the university's functions of promoting the free exchange of perhaps controversial ideas, the primarily political or ideological nature of these student organizations results in the likelihood of some of these groups' positions being repugnant to students who hold a differing political or ideological position. Compelling students who are strongly opposed to the positions that these student organizations advocate to subsidize these organizations which offer no more than limited, incidental, educational benefits to the UW-Madison campus is not narrowly tailored to prevent the infringement of the dissenting students' First Amendment rights. The university's compelling interest in promoting the free exchange of ideas by subsidizing the political and ideological student organizations does not justify such infringement because the university has not carefully tailored the implementation of its interests so as to avoid the unnecessary infringement of the First Amendment rights of those students who disagree with the political and ideological messages being advocated by certain student organizations [1996 U.S. Dist. LEXIS 20980 at *29-30].

The court issued a declaratory judgment that the mandatory fee structure violated the students' free speech rights. It did not address their free exercise or statutory claims.

The plaintiffs had also requested injunctive relief, but the court did not address this issue, stating that the parties had since represented to the court that they could fashion their own remedy given the court's ruling on the constitutionality of the fee system. The appellate court dismissed the subsequent appeal. *Southworth v. Grebe*, No. 97-1001, 1997 U.S. App.

LEXIS 17923 (7th Cir. July 11, 1997) because it determined the case was not "final and appealable" until the district court ruled on the plaintiffs' request for injunctive relief. At the time this supplement went to press, the district court had not yet issued that ruling.

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As this Supplement went to press, the California Court of Appeal issued a ruling on the final unresolved issue in the Smith litigation (LHE 3d, pp. 521-522). In *Smith v. Regents of the University of California*, 65 Cal. Rptr. 2d 813 (Cal. Ct. App. 1997), the court ruled that the University of California at Berkeley could use mandatory student fees to support the student Senate, despite the argument by the plaintiffs that the student Senate took political positions and engaged in political activity. The court ruled that the student Senate served an educational purpose and provided significant benefits to students, including providing a forum for the discussion of controversial topics and stimulating students' interest in political issues.

An alternative to an opt-out provision was ordered by a federal appellate court in *Carroll v. Blinken* (LHE 3d, p. 522), when the court allowed SUNY-Albany to allocate mandatory student fees to New York's PIRG, but placed restrictions on how PIRG spent the student fee monies. That court remanded the case to the district court to fashion a plan to ensure that only activities that benefitted SUNY-Albany students would be funded by mandatory student fees. The district court permitted the following activities to receive student fee funding:

> activities, projects and expenses which involve and/or are for the benefit of SUNY-Albany students . . . This requirement is satisfied not only by the funding of activities and projects which occur on, and all expenses incurred at, the SUNY-Albany campus but also by the funding of all activities and expenses which benefit and/or involve SUNY-Albany students. [42 F.3d 122 at 126 (2d Cir. 1994) (quoting the district court's opinion, No. 83 Civ. 1272 RO, 1993 WL 47806 (S.D.N.Y. Nov. 15, 1993))].

The student plaintiffs appealed, asserting that the district court's language was too broad and claiming that only on-campus activities should be funded with student fees. When the case reached it a second time, the appellate court agreed that the district court's language was too broad, but it refused to limit PIRG expenditures to on-campus activities. The court noted that many of the university's educational activities occurred off-campus -- such as student internships and research at off-campus locations -- and thus the criterion was whether the PIRG activities furthered the educational goals of SUNY-Albany, not where those activities took place. The appellate court affirmed the district court's ruling that the report that PIRG was required to make to the University was adequate. *Carroll v. Blinken*, 42 F.3d 122 (2d Cir. 1994).

4.11.3. Principle of nondiscrimination. For a discussion regarding organizations that restrict their membership to members of various racial or ethnic backgrounds, *see* "A Place of Their Own," *The Chronicle of Higher Education*, Dec. 8, 1995- A33, and Wendy Hernandez, "The Constitutionality of Racially Restrictive Organizations Within the University Setting," 21 *J. of Coll. & Univ. Law* 429, 434-443 (1994).

4.11.4. Religious activities. The United States Supreme Court has reversed the judgments of the trial and appellate courts in the *Rosenberger* case (LHE 3d pp. 530-31). By a 5 to 4 vote in *Rosenberger v. Rector and Visitors of University of Virginia*, 115 S. Ct. 2510 (1995), the majority held that: (a) the university's refusal to provide Student Activities Fund (SAF) funds for a student organization, Wide Awake Productions (WAP), violated the students' First Amendment free speech rights; and (b) university funding for WAP would not violate the First Amendment's establishment clause, and the university therefore could not justify its violation of the free speech clause by asserting a need to adhere to the establishment clause. Justice Kennedy wrote the opinion for the majority of five; Justice O'Connor wrote an important concurring opinion; and Justice Souter wrote the opinion for the four dissenters.

The tension between the free speech and establishment clauses of the First Amendment is clearly illuminated by the sharply divergent majority and dissenting opinions. The majority opinion addresses *Rosenberger* from a free speech standpoint, and finds no establishment clause justification for infringing the rights of a student publication that reports the news from a religious perspective. On the other hand, the dissent characterizes the students' publication as an evangelical magazine directly financed by the state and regards such funding to be a clear example of an establishment clause violation. Justice O'Connor's narrow concurring opinion, tailored specifically to the facts of the case, serves to limit the majority's holding and reduce the gulf between the majority and the dissent.

The *Rosenberger* defendant, a public university, had established a mandatory student activities fee, the income from which supported a Student Activities Fund (SAF) used to subsidize a variety of student organizations. All recognized student groups had to achieve the status of a "Contracted Independent Organization" (CIO), after which some groups could then submit certain of its bills to the Student Council for payment from SAF funds. The eligible bills were those from "outside contractors" or "third-party contractors" that provide services or products to the student organization. Disbursement was made directly to the third party; no payments went directly to a student group. The university's SAF guidelines prohibited the use of SAF funds for, *inter alia*, religious activities, defined by the guidelines as an activity that "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality."

The *Rosenberger* plaintiffs were student members of Wide Awake Productions (WAP), a CIO established to publish a campus magazine that "offers a Christian perspective on both personal and community issues" (115 S. Ct. at 2515, quoting from the magazine's first issue). WAP applied for SAF funding -- funding already provided to fifteen student "media groups" -- to be used to pay the printer that published its magazine. The university rejected the request on grounds that WAP's activities were religious. The students challenged this denial of funding as a violation of their First Amendment speech and press rights.

Explicating the majority's free speech analysis, Justice Kennedy described the SAF as a forum "more in a metaphysical sense than in a spatial or geographic sense," but nonetheless determined that the SAF, as established and operated by the university, is a "limited public forum" for First Amendment purposes. Having opened the SAF to the university community, the university "must respect the lawful boundaries it has itself set. [It] may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum' (citing *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 804-806 (1985)), nor may it discriminate against speech on the basis of its viewpoint (citing *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141, 2147 (1993))" [115 S. Ct. at 2516-17].

The majority then determined that the University had denied funding to WAP because of its perspective, or viewpoint, rather than because it dealt with the general subject matter of religion. Thus, although "it is something of an understatement to speak of religious thought and discussion as just a viewpoint," "viewpoint discrimination is the proper way to interpret the university's objection to Wide Awake":

> By the very terms of the SAF prohibition, the [u]niversity does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of

> inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make the third-party payments [to the printer], for the subjects discussed were otherwise within the approved category of publications [115 S. Ct. at 2517-18].

Furthermore, the majority rejected the university's contention that "no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints." Because of the "complex and multifaceted nature of public discourse . . . [i]t is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint" [115 S. Ct. at 2518].

Having determined that the university had violated the students' free speech rights, the majority considered whether providing SAF funds to WAP would nevertheless violate the establishment clause. In order for a government regulation to survive an establishment clause challenge it must be neutral toward religion (see LHE 3d, Section 1.6). Relying on past decisions upholding governmental programs when "the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse" (115 S. Ct. at 2521), the Court held that the SAF is neutral toward religion:

> There is no suggestion that the university created [the SAF] to advance religion or adopted some ingenious device with the purpose of aiding a religious cause. The object of the SAF is to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life . . . . The category of support here is for "student news, information, opinion, entertainment, or academic communications media groups," of which *Wide Awake* was 1 of 15 in the 1990 school year. WAP did not seek a subsidy because of its Christian editorial viewpoint; it sought funding as a student journal, which it was [115 S. Ct. at 2522].

Thus, the WAP application for funding depended not on the religious editorial viewpoint of the publication, nor on WAP being a religious organization, but rather on the neutral factor of its status as a student journal. "Any benefit to religion is incidental to the government's provision of secular services for secular purposes on a religion-neutral basis" (115 S. Ct. at 2524).

In completing its establishment clause analysis, the majority distinguished another line of cases forbidding the use of tax funds to support religious activities and rejected the contention that the mandatory student activities fee is a tax levied for the support of a church or religion. Unlike a tax, which the majority describes as an exaction to support the government and a revenue-raising device, the student activity fee is used for the limited purpose of funding student organizations consistent with the educational purposes of the university. No public funds would flow directly into WAP's coffers; instead, the university would pay printers (third-party contractors) to produce WAP's publications. This method of third-party payment, along with university-required disclaimers stating that the university is not responsible for or represented by the recipient organization, evidenced the attenuated relationship between the university and WAP. The majority found no difference in "logic or principle, and no difference of constitutional significance, between a school using its funds to operate a facility to which students have access [as in *Widmar*], and a school paying a third-party contractor to operate the facility on its behalf."

Justice O'Connor's important concurring opinion carefully limits her analysis to the facts of the case, emphasizing that "[t]he nature of the dispute does not admit of any categorical answers, nor should any be inferred from the Court's decision today." Justice O'Connor based her concurrence on four specific considerations that ameliorate the establishment clause concerns that otherwise would arise from government funding of religious messages. First, at the insistence of the university, student organizations such as WAP are separate and distinct from the university. All groups that wish to be considered for SAF funding are required to sign a contract stating that the organization exists and operates independently of the university. Moreover, all publications, contracts, letters or other written materials distributed by the group must bear a disclaimer acknowledging that, while members of the university faculty and student body may be associated with the group, the organization is independent of the "corporation which is the university and which is not responsible for the organizations' contracts, acts, or omissions."

Second, Justice O'Connor noted that no money is given directly to WAP. By paying a third party vendor, in this case a printer, to publish

WAP's journal, the university is able to ensure that the funding which it has granted is being used to "further the University's purpose in maintaining a free and robust marketplace of ideas, from whatever perspective." This method of funding, according to the concurrence, is analogous to a school providing equal access to a generally available physical facility, like a printing press on campus.

Third, because WAP does not exist "in a vacuum," it will not be mistakenly perceived to be university-endorsed. This potential danger is greatly diminished by both the number and variety of other publications receiving SAF funding. O'Connor thus found it illogical to equate university funding of WAP with the endorsement of one particular viewpoint.

Fourth, the mandatory student fee may be susceptible to a free speech clause challenge by a student who objects to paying for speech with which she disagrees (see generally LHE 3d, Section 4.11.2) and that the remedy in such a situation may be to allow the student to "opt out" of paying a portion of the fee:

> [T]he existence of such an opt-out possibility not available to citizens generally . . . provides a potential basis for distinguishing proceeds of the student fees in this case from proceeds of the general assessments in support of religion that lie at the core of the prohibition against religious funding, . . . and from government funds generally. Unlike monies dispensed from state or federal treasuries, the Student Activities Fund is collected from students who themselves administer the fund and select qualifying recipients only from among those who originally paid the fee. The government

> neither pays into nor draws out of this common pool, and a fee of this sort appears conducive to granting individual students proportional refunds. The Student Activities Fund, then, represents not government resources, whether derived from tax revenue, sales of assets, or otherwise, but a fund that simply belongs to the students" [115 S. Ct. at 2527-28 (O'Connor, J., concurring) (citations omitted)].

Although the first three of Justice O'Connor's distinctions were also relied on by Justice Kennedy, Justice O'Connor states her conclusions more narrowly than Kennedy and limits her reasoning more tightly to the unique facts of the case. Justice O'Connor, unlike Justice Kennedy, also adds the fourth consideration regarding potential opt-out remedies. Since Justice O'Connor provides the critical fifth vote that forms the 5 to 4 majority, her opinion carries unusual significance. To the extent her establishment clause analysis is narrower than Justice Kennedy's, it is her opinion rather than his that apparently provides the current baseline for understanding the establishment clause restrictions on public institutions' funding of student religious groups.

The four dissenting justices disagree with both the majority's free speech clause analysis and its establishment clause analysis. Regarding the former, Justice Souter insisted that the university's refusal to fund WAP was not viewpoint discrimination but rather a "subject-matter distinction," an educational judgment not to fund student dialogue on the particular subject of religion regardless of the viewpoints expressed. Regarding the establishment issue, which he termed the "central question in this case," Justice Souter argued that, because "there is no warrant for distinguishing among public funding sources for purposes of applying the First Amendment's prohibition of religious establishment, . . . the university's refusal to support petitioners' religious activities is compelled by the Establishment Clause." Emphasizing that WAP's publications call on Christians "to live, in word and deed, according to the faith they proclaim . . . and to consider what a personal relationship with Jesus Christ means" (115 S. Ct. at 82, quoting from WAP's first issue), Justice Souter likens the paper to an "evangelist's mission station and pulpit" (115 S. Ct. at 2535). He thus argues that the use of public (SAF) funds for this activity is a "direct subsidization of preaching the word" and a "direct funding of core religious activities by an arm of the State" (115 S. Ct. at 2535).

The majority's reasoning in *Rosenberger* generally parallels the Court's earlier reasoning in *Widmar v. Vincent* (LHE 3d, pp. 526-530) and generally affirms the free speech and establishment principles articulated in that case. More importantly, both Justice Kennedy's and Justice O'Connor's opinions extend student organizations' First Amendment rights beyond access to *facilities* (the issue in *Widmar*) to include access to *services*. Some critics of the majority (such as the four dissenting justices) and some religious interest groups advocating a broad reading of Justice Kennedy's opinion, argue in addition that the majority's reasoning may even extend to access to direct funding for religious activities or religious student organizations.

The Kennedy and O'Connor opinions also refine the *Widmar* free speech analysis by distinguishing between *content*-based restrictions on speech (the issue in *Widmar*) and *viewpoint*-based restrictions (the issue as the Court framed it in *Rosenberger*). The latter type of restriction, sometimes called viewpoint discrimination, is the most suspect of all speech restrictions and the type least likely to be tolerated by the courts (*see* generally LHE 3d, Section 4.10, p. 510 and Section 7.4.5, p.797). *Widmar* appears to reserve a range of discretion for a higher educational institution to make academic judgments based on the educational *content* of a student organization's activities (LHE 3d pp. 529-30); *Rosenberger* appears to prohibit any such discretion when the institution's academic judgment is based on consideration of the student group's *viewpoints* (*see* 115 S. Ct. at 2524-25).

In the wake of *Rosenberger*, public institutions need to reassess their guidelines for funding student activities. Given the Court's determination that a refusal to fund publications because of their religious viewpoint (as opposed to a refusal to fund all religious activity) is unconstitutional, colleges will need to either forego funding for all student activities -- an unlikely and unnecessary reaction to *Rosenberger* -- or provide funding on a neutral basis that does not take into account the religious viewpoint, or other particular viewpoint, of the organizations receiving funding.

* * * * *

Rosenberger calls into question the earlier decision of *Tipton v. University of Hawaii*, 15 F.3d 922 (9th Cir. 1994) (LHE 3d, p. 531), in which the court had upheld the defendant's decision to deny funding to student organizations whose purpose is to promote a particular religious point of view. The Tipton court relied on the U.S. Supreme Court's decision in *Rust* *v. Sullivan*, 111 S. Ct. 1759 (1991) (LHE 3d, Section 7.4.5), which permitted the government to decline to subsidize certain forms of constitutionally protected activity. The majority in *Rosenberger* rejected any reliance on *Rust*, however, distinguishing between situations in which the government pays private entities to "convey its own message" (as in *Rust*) and situations in which government subsidizes private groups who articulate not the government's message, but their own.

Sec. 4.12. Fraternities and Sororities

4.12.1. Institutional recognition and regulation of fraternal organizations. The Missouri anti-hazing law has survived an action to have the statute declared void for vagueness. Where a student was convicted of hazing Kappa Alpha Psi pledges resulting in the death of one of them, the Supreme Court of Missouri held that the anti-hazing statute was not void for vagueness, nor did it violate the equal protection clause, and the student was adequately informed of the charges against him. *State v. Allen*, 905 S.W.2d 874 (Mo. 1995).

* * * * *

A recent white paper (E.D. Guilland, *Developing Effective and Legally Sound Alcohol Policies*, National Association of College and University Attorneys, 1994) recommends creating alcohol policies with special concern for the following points:

1. Adopt only rules and sanctions that the school is willing to enforce.
2. Enforce the policy consistently.
3. Be familiar with all laws relating to the sale of alcoholic beverages and the liability of "social hosts" who serve beverages.
4. Emphasize education.
5. Focus on circumstances that present the greatest danger of risk and liability.

4.12.2. Institutional liability for the acts of fraternal organizations. There have been further proceedings in *Estate of Hernandez* (LHE 3d, p. 537), in which the personal representative of a man killed in an automobile accident caused by an intoxicated fraternity member sued the University of Arizona and the fraternity. The Supreme Court of Arizona reversed the award of summary judgment to the defendant fraternity and the individual fraternity members and pledges by the trial and appellate courts at 866 P.2d 1330 (Ariz. 1994). The Court said that the lower courts had misinterpreted Arizona's social host law; that it did not immunize non-licensees (social hosts, as compared with bar owners) who served individuals who were under the legal drinking age. The immunity, said the court, applies only to entities that are licensed to serve alcohol, not social hosts.

The court also ruled that state tort law provided a liability theory for one who provides alcohol to an underage individual who then drives a car, stating that "a minor is similar to an adult who has diminished judgment and capacity to control his alcohol consumption" (866 P.2d at 1341).

On remand, the trial court entered summary judgment in favor of the national fraternity and various individual members and pledges of the local chapter. The appellate court reversed (924 P.2d 1036 (Ariz. Ct. App. 1995)), stating:

> The national fraternity invites membership in a loosely associated group of clubs, one of the primary purposes of which is to engage in parties where liquor is served. . . The national fraternity, having sponsored what amounts to a group of local drinking clubs, cannot disclaim responsibility for the risks of what it has sponsored. . . That a duty exists in this circumstance was implicitly admitted by the act of the national fraternity in sending to local chapters instructions to abide by local laws and university regulations in serving alcohol at chapter functions. Whether such an admonitory letter is sufficient to discharge any duty to exercise reasonable care is, of course, for the jury to decide . . . The argument that the national fraternity had no power to control the activities of the local chapter or its members is belied by the much stricter alcohol policy adopted by the local chapter at the request of the national after the incident in this case" [924 P.2d at 1038-1039].

The court affirmed summary judgment for the national fraternity on other grounds, such as respondeat superior and landlord-tenant law.

The court also reversed the summary judgment that had been granted individual fraternity members and pledges, noting that a jury could find that each individual knew that alcohol would be served to minors, and that his contribution to the fund to purchase the alcohol made him a participant in an illegal venture. Even those pledges who had not yet contributed to the fund were participants in the illegal venture, said the appellate court.

The defendants appealed again, but the Arizona Supreme Court addressed only the appeal of the pledges. The court reversed the appellate court's ruling with respect to the pledges, reinstating the summary judgment on their behalf (*Hernandez-Wheeler v. Flavio*, 930 P.2d 1309 (Ariz. 1997)). The court noted that the pledges had no control over the arrangements for the party, did not contribute funds or purchase any alcohol, compared with members of the fraternity, who acted through a committee to purchase and distribute the alcohol to minors. Finding that the pledges had no control over these matters, the court ruled as a matter of law that they did not participate in the joint venture. The court vacated the portion of the appellate court opinion that dealt with the pledges, but left undisturbed its rulings affecting the national fraternity and the individual members of the fraternity.

In *Rothbard v. Colgate University*, 652 N.Y.S.2d 146 (N.Y. App. Div. 1997), a New York intermediate appeals court rejected a fraternity member's argument that the university should be held liable for injuries resulting from his fall, while intoxicated, from the portico outside his window. University rules prohibited students from both underage drinking and from standing on roofs or porticos. The fraternity member claimed that the university should have been aware that both policies were routinely violated at the fraternity house and that the university's failure to enforce its own rules caused his injuries. The court held that the inclusion of rules in the student handbook did not impose upon the university a duty to supervise the plaintiff and take affirmative steps to prevent him from violating the rules. Quite succinctly, the court held that an institution has no duty to shield students from their own dangerous activities.

When a student injured as a result of his or her own alcohol consumption sues the institution and/or the fraternity, the institutional and individual defendants in these cases have typically argued that the injury was the result of the student's voluntary decision to drink and that the furnishing of alcohol, or other actions taken by or imputed to the defendants, was therefore not the proximate cause of the injury. This argument has generally been unsuccessful.[1] In one recent case, student Michael Nisbet died as a result of alcohol he drank while taking part in an "initiation" required for him to gain membership on the St. Pat's Board at the University of Missouri at Rolla. *Nisbet v. Bucher*, 949 S.W. 2d 111 (Mo. April 29, 1997). St. Pat's Board was a campus organization responsible for planning the annual St. Patrick's Day festivities at the university, and members included representatives from several campus fraternities. Michael Nisbet's parents filed a wrongful death suit against the Board members and the fraternities, alleging that the students forced Michael to consume alcohol, including a "heated preparation of grain alcohol and peas," that they coerced Michael to drink until he became intoxicated and even after he became unconscious, and that they left him face down and unattended, delaying medical treatment for him. He died two days later.

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[1] For a comprehensive collection of cases stemming from voluntary intoxication of students, see Flaherty, M.R., "Tort Liability of a College or University for Injury Suffered by Student as a Result of Own or Fellow Student's Intoxication." 68 A.L.R. 4th 228 (1989 and periodic supp.).

It is unclear from the opinion and the procedural history whether the university would face liability. What is notable, however, it that the Missouri appeals court emphatically rejected defendants' argument that Michael Nisbet was the proximate cause of his own death:

> We recognize that Michael could have avoided the situation by walking away from the initiation activities. In that respect, Michael's actions could be construed as voluntary. Yet, as the petition alleges, participation in the initiation activities was a prerequisite for membership on the St. Pat's Board. If great pressure was applied to Michael to comply with the membership 'qualifications' of the St. Pat's Board, he may have been blinded to the danger he was facing....In other words, his will to drink or not drink may have been overborne by the requirements to achieve membership on the St. Pat's Board and by the pressure he was receiving from the defendants [949 S.W. 2d at 116].

The court ruled that it was for the trier of fact to determine if Michael Nisbet's actions were voluntary or coerced. In addition, the court held that there was another theory supporting plaintiffs' claim that the individual defendants were the proximate cause:

> Moreover, plaintiffs sufficiently pleaded that the proximate cause of Michael's death was the abandonment of him by defendants while he was in a state of acute alcohol intoxication brought on by their acts . . . One who acts gratuitously or otherwise is liable for the negligent

> performance of an act, even though there was no duty to act originally ... Defendants not only failed to seek medical assistance for him but also delayed treatment for him. Defendants' failure to call 911 or to take Michael to the hospital when they realized he was in a perilous condition effectively terminated his chance of survival [949 S.W. 2d at 117].

If other courts follow this court's reasoning, this case may signal an end to dismissal of claims on summary judgment and a greater propensity to allow a jury to determine liability.

* * * * *

Even if a college or university is not sued, fraternities and their members are facing litigation by students or others injured, allegedly as a result of alcohol served at a fraternity party. Where a first-year coed was sexually assaulted by an alumni member in a fraternity house after a homecoming party, the court held that the local fraternity chapter and the national fraternity had no duty to protect the invitee from sexual assault, nor was the local chapter liable under Indiana's Dram Shop Act. The court found no foreseeability of the attack as a result of serving alcohol to the alumni member and no actual evidence that the alumni member drank beer provided by the fraternity. *Motz v. Johnson*, 651 N.E.2d 1163 (Ind. App. 1995). Discovery in such cases may be limited, however. In connection with another alleged sexual assault at a fraternity house leased to the fraternity by the university, a state appellate court held that the lower court did not abuse its discretion in refusing to require the woman to respond to questions concerning her sexual partners prior to and after the alleged assault. *Anderson v. Cornell University*, 638 N.Y.S.2d 852 (N.Y. App. Div. 1996).

The Michigan Court of Appeals has held that the Tau Kappa Epsilon national fraternity was not liable for a fatal accident involving alcohol supplied by the local chapter. In *Colangelo v. Theta Psi Chapter of Tau Kappa Epsilon*, 517 N.W.2d 289 (Mich. Ct. App. 1994), the court reasoned that the national fraternity had no duty to supervise the local chapters' daily activities, and that the national fraternity could not have foreseen that the local chapter would have a party that would result in intoxicated individuals or injury. The court further reasoned that the national fraternity was ill-equipped to supervise the drinking and other activities carried on by local chapters, and that to impose a duty would result in fundamentally changing the role of national fraternities "from an instructor of the principles, rituals, and traditions of the fraternity to a central planning and policing authority" [517 N.W.2d at 135-136].

Sec. 4.13. Student Press

4.13.1. General perspectives. *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510 (1995) (further discussed in Section 4.11.4 above), is the first U.S. Supreme Court pronouncement on mandatory student fee allocations for student publications. The case generally confirms the principles from *Arrington* (LHE 3d pp. 538-39) and *Stanley* (LHE 3d p. 540). But *Rosenberger* also extends the analysis of the earlier cases in two important respects: (1) *Rosenberger* focuses specifically on viewpoint discrimination issues that may arise when a university or its student government decides to fund some student publications but not others; and (2) *Rosenberger* addresses the special situation that arises when a student publication has an editorial policy based on a religious perspective.

The plaintiffs in *Rosenberger* were students who published a magazine titled "Wide Awake: A Christian Perspective at the University of Virginia." As described by the U.S. Supreme Court:

> The paper's Christian viewpoint was evident from the first issue, in which its editors wrote that the journal "offers a Christian perspective on both personal and community issues, especially those relevant to college students at the University of Virginia." App. 45. The editors committed the paper to a two-fold mission: "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." *Ibid.* The first issue had articles about racism, crisis pregnancy, stress, prayer, C.S. Lewis' ideas about evil and free will, and reviews of religious music. In the next two issues, Wide Awake featured stories about homosexuality, Christian missionary work, and eating disorders, as well as music reviews and interviews with University professors. Each page of Wide Awake, and the end of each article or review, is marked by a cross. The advertisements carried in Wide Awake also reveal the Christian perspective of the journal. For the most part, the advertisers are churches, centers for Christian study, or Christian bookstores. [115 S. Ct. at 2515]

The university's guidelines for student fee allocations ("Guidelines") permitted "student news, information, opinion, entertainment, or academic communications media groups," among other groups, to apply for allocations that the university would then use to pay the group's bills from outside contractors who printed its publication. The Guidelines provided, however, that student groups could not use fee allocations to support "religious activity," defined as activity that "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality." Fifteen student publications received funding, but the Wide Awake publication did not because the Student Council determined that it was a religious activity. Wide Awake's members challenged this denial as a violation of their free speech and press rights under the First Amendment.

The U.S. Supreme Court upheld Wide Awake's claim because the university's action was a kind of censorship based on the publication's viewpoint:

> Vital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and if so for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. . . . For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the

> vital centers for the nation's intellectual life, its colleges and university campuses. [115 S. Ct. at 2520]

The Court then addressed the additional considerations that arose in the case because Wide Awake published *religious* viewpoints rather than *secular* viewpoints based on politics or culture. Since Wide Awake sought to use public (university) funds to subsidize religious viewpoints, the First Amendment establishment clause also became a focus of the analysis. The Court, however, rejected the argument that funding Wide Awake would violate the establishment clause (see the discussion in this Supp., Section 4.11.4). Concluding that the university funding would be "neutral toward religion," the Court emphasized that this funding was part of a broad program that "support[ed] various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life." The Court also emphasized that the university's Guidelines:

> have a separate classification for, and do not make third-party payments on behalf of, "religious organizations," which are those "whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." The category of support here is for "student news, information, opinion, entertainment, or academic communications media groups," of which Wide Awake was 1 of 15 in the 1990 school year. WAP did not seek a subsidy because of its Christian editorial viewpoint; it sought funding as a student journal, which it was. [115 S. Ct. at 2522]

4.13.2. Permissible scope of regulation. In *Leeds v. Meltz*, 85 F.3d 51 (2d Cir. 1996) (discussed in this Supp., Section 1.5.2), the court -- like the courts in *Goudelock and Sinn* (LHE 3d, p. 541) -- refused to find that a student newspaper was engaged in state action when it rejected an advertisement submitted to the paper.

* * * *

For the latest word from the U.S. Supreme Court on First Amendment protections for advertising in general and alcohol-related ads in particular (LHE 3d p. 542), see *44 Liquormart v. Rhode Island*, 116 S. Ct. 1495 (1996). Although the Justices wrote five opinions, none of which commanded a majority, the overall impact of the opinions appears to increase the constitutional protection for commercial advertising.

4.13.4. Libel. The validity and importance of the *Mazart* case (LHE 3d, pp. 544-48) has been reaffirmed by the court in *McEvaddy v. City University of New York*, 633 N.Y.S.2d 4 (N.Y. App. Div. 1995). The *McEvaddy* court dismissed a defamation claim brought against City University of New York for an allegedly libelous article published in the student newspaper. Citing *Mazart*, the court held that "[t]he presence of a faculty advisor to the paper, whose advice is nonbinding, and the financing of the paper through student activity fees . . . , do not demonstrate such editorial control or influence over the paper by the [university] as to suggest an agency relationship." The New York Court of Appeals, the state's highest court, denied the claimant's motion for leave to appeal (664 N.E.2d 1258 (N.Y. 1996)).

Sec. 4.14. Student Housing

4.14.1. Housing regulations. A case brought under both the Fair Housing Act (24 U.S.C. secs. 3601-31 (1994)) and Title IX of the Education Amendments of 1972 (LHE 3d, Section 7.5.3), although subsequently vacated for lack of jurisdiction by the federal appellate court, suggests a potential source of liability for colleges and landlords of off-campus housing. In *Wilson v. Glenwood Intermountain Properties, Inc.*, 876 F. Supp. 1231 (D. Utah 1995), *vacated*, 98 F. 3d 590 (10th Cir. 1996), the trial court rejected claims by two nonstudent plaintiffs that the housing regulations of Brigham Young University violated these laws and that the actions of landlords, who had entered agreements with BYU to segregate their housing by gender and to rent only to BYU students, also violated the Fair Housing Act. The litigation involved claims of discrimination on the basis of gender, religion, and familial status. Regarding gender, the plaintiffs claimed that the landlords' segregation of tenants by gender violated the FHA requirement that landlords offer non-discriminatory "terms, conditions, and privileges" in the rental of housing; and that the landlords' advertisements, which noted that they rented only to male, or only to female, BYU students, discriminated against them on the basis of gender.

The trial court had dismissed the claims involving religious discrimination and discrimination with respect to advertising on jurisdictional grounds, but had ruled on the plaintiffs' other gender discrimination claim on the merits, awarding summary judgment to the defendants. The appellate court vacated the lower court's judgment and remanded the case with instructions to dismiss, ruling that the plaintiffs lacked standing to challenge the landlords' practices as a form of gender discrimination. Preliminarily, the court stated, renting only to students does not violate the Fair Housing Act, so the plaintiffs lacked standing because, as nonstudents, they would not be eligible to rent from these landlords even if they could have met the gender requirements. But the court examined carefully the claim of discriminatory advertising (which the trial court had dismissed with very little analysis), stating that, had the plaintiffs alleged that they had been injured by the gender-exclusive advertising, they might have been able to state a claim. Because no such injury had been shown, the existence of the "discriminatory" advertising, by itself, was insufficient to confer standing on the plaintiffs to challenge the landlords' actions under the Fair Housing Act.

* * * * *

The practice of granting of exceptions to campus residency requirements was recently challenged in *Rader v. Johnston*, 924 F.Supp. 1540 (D. Neb. 1996), when an eighteen-year-old first-year student at the University of Nebraska-Kearney challenged the university's policy requiring first-year students to live on campus. Students who were nineteen, married, or living with their parents or legal guardians were expressly excepted from the policy. The rationale for the policy, according to the university, was that it "fosters diversity, promotes tolerance, increases the level of academic achievement, and improves the graduation rate of its students, [while] ensur[ing] full occupancy of . . . residence halls" (924 F.Supp. at 1543). The student contended that living in the campus residence halls would cause him to suffer a definite hardship and hinder the free exercise of his religion. Since he did not qualify for exception under any of the enumerated exceptions to the residency policy, he petitioned the university for an ad hoc exception "on the ground that his religious convictions exhort him to live in an environment that encourages moral excellence during [his] college career" and, to this end, he requested that the university "allow him to live with other students of similar faith in the Christian Student Fellowship facility, across the street from the . . . campus" (924 F.Supp. at 1544-45). The university denied the student's request, citing its rationale for the residency requirement and finding that nothing in the residence hall environment would hinder the student's practice of religion.

The court, relying on a U.S. Supreme Court decision in *Church of the Lukumi Babalu Aye v. City of Hileah,* 508 U.S. 520 (1993), found in favor of the student. It cited the fact that "over one third of freshman students are excused" from the residency requirement under the enumerated exceptions or under ad hoc exceptions that the university "routinely granted" for other students. The university had, according to the court, created "a system of 'individualized government assessment' of the students' requests for exemptions" from the residency requirement, and had granted numerous exceptions for non-religious reasons, but had "refused to extend exceptions to freshmen who wish to live at CSF [Christian Student Fellowship] for religious reasons" (924 F.Supp. at 1553). The court warned that:

> a policy is not enforced in a neutral manner when administrators base decisions upon their own religious experiences and their own perceptions of the religious beliefs of others . . . . State actors may not without justification refuse to extend exceptions that they routinely grant to persons for non-religious reasons to those requesting the same exception based on sincerely held religious beliefs" [924 F.Supp. 1555].

Under *Lukumi Babalu Aye*, therefore, the university's on-campus residency policy for first-year students was not "generally applicable" or "neutrally applied" to all students and could withstand judicial scrutiny, as applied to *Rader*, only if the denial of his request for an exception "serves a compelling state interest."

The university identified four purposes in support of its argument that the residence policy serves "a compelling state interest." These purposes were the same ones that provide the basic rationale for the policy: "students who live in residence halls . . . do better academically [and] have higher graduation rates . . ., the policy fosters diversity . . ., promotes tolerance among students . . ., [and] ensures full occupancy of UNK's residence halls" (924 F.Supp. 1556). While the court agreed that these interests may be legitimate and important to the state, it found that the university's implementation of the policy, which allowed over one third of the students to be granted exceptions, "undercuts any contention that its interest is compelling." These interests therefore could not justify the resulting infringement on Rader's free exercise rights.

* * * * *

The U.S. Department of Education has determined that Cornell University has not violated Title VI of the Civil Rights Act of 1964 (LHE 3d, Section 7.5.2) by creating "ethnic program houses," which are residence halls whose residents are predominantly members of a particular race or ethnic group. The positive ruling was premised on the understanding that admission to the residences was not restricted to a particular race or ethnic group. Karla Haworth, "Education Department Finds No Civil-Rights Violations at Cornell's Ethnic Houses," *The Chronicle of Higher Education*, October 4, 1996 at A45.

* * * * *

The U.S. Department of Housing and Urban Development and the U.S. Department of Environmental Protection have published a final rule related to the disclosure of the use of lead paint in housing. The rule was promulgated in response to the Residential Lead-Based Paint Hazard Reduction Act of 1992 (Pub. L. 102-550 (1992)), and applies to housing in which children live, such as married student housing. The final rule can be found at 61 Fed. Reg. 9082 (March 6, 1996). It will be codified at 40 CFR Part 745 and 24 CFR Part 35.

4.14.2. Searches and seizures. The Supreme Judicial Court of Massachusetts has determined that a warrantless search of a residence hall room by campus police at Fitchburg State College violated the Fourth Amendment. In *Commonwealth v. Neilson*, 666 N.E.2d 984 (Mass. 1996), a student challenged his arrest for illegal possession of marijuana, asserting that the search of his room was unconstitutional. Neilson had signed a residence hall contract that provided that student life staff members could enter student rooms to inspect for health or safety hazards.

A maintenance worker believed he heard a cat inside a four-bedroom suite; one of the bedrooms was occupied by Neilson. He reported the sound to college officials, who visited the suite and informed the occupants that no cats were permitted in university housing. The official posted notices on the bedroom doors of the suite, stating that a "door-to-door check" would be held that night to ensure that no cat was present. When the officials returned, Neilson was not present. They searched his bedroom, and noticed that the closet light was on. Because they were concerned that there might be a fire hazard, they opened the door and discovered two four foot marijuana plants growing under the light. At that point the campus police were called; they arrived, took pictures of the marijuana, and removed it from the room. No search warrant was obtained at any time.

The court stated that the initial search (to locate the cat) was reasonable, as was the decision to open the closet door, since it was based upon a concern for the students' safety. The constitutional violation occurred, according to the court, when the campus police arrived and seized the evidence without a warrant or the consent of Neilson. Neilson, in the residence hall contract, had consented to student life officials entering his room, but had not consented to campus police doing so, said the court. Furthermore, the plain view doctrine (LHE 3d, p. 555) did not apply in this case because the campus police were not lawfully present in Neilson's room, according to the court. Therefore, all evidence seized by the campus police was properly suppressed by the trial judge.

If the police do not actually enter the student's room, the search may not run afoul of the Fourth Amendment, at least at a private college. The Tennessee Supreme Court has ruled that a warrantless search of a dormitory room by a director of residence life at Knoxville College, a private institution, did not involve state action. *State v. Burroughs*, 926 S.W. 2d 243 (Tenn. 1996). The student housing contract ad the student handbook both provided that students must consent to unannounced, unscheduled entries for the purpose of maintaining law and order." The administrator had received information that a student might have controlled substances in his room. Although the administrator knocked on the student's door, there was no answer; the administrator searched the room and found electronic scales and a box containing white powder. The administrator removed the items from the student's room and turned them over to the police.

The court rejected the student's Fourth Amendments claims, noting that the handbook and housing contract both forbid the possession or use of alcohol and drugs, and gave the residence hall director authority to search student rooms. Said the court,

> while the relationship between private colleges and universities and the local police may establish a state action link sufficient to engage the Fourth Amendment protections, such a link is not present here. . . . [The administrator]

> conducted the warrantless search not as an agent of the state,but as a college official whose purpose and actions were in furtherance of college policy, not state policy [926 S.W.2d at 246]

Sec. 4.15. Athletics

4.15.3. Sex discrimination. There have been further proceedings in *Cohen v. Brown University* (LHE 3d, p. 567). After the appellate court remanded the case to the district court, that court held a full trail on the merits, after which it ruled again in favor of the plaintiffs and ordered Brown to submit a plan for achieving full compliance with Title IX. When the district court found Brown's plan to be inadequate and entered its own order specifying that Brown must remedy its Title IX violation by elevating four women's teams to full varsity status, Brown appealed again. In late 1996, the First Circuit issued another ruling in what it called "*Cohen* IV" (*Cohen* II being its earlier 1993 ruling, and *Cohen* I and *Cohen* III being the district court rulings that preceded *Cohen* II and *Cohen* IV). By a 2-1 vote in *Cohen* IV, 101 F.3d 155 (1st Cir. 1996), the appellate court affirmed the district court's ruling that Brown was in violation of Title IX. In so doing, the court explicitly relied upon, and refused to reconsider, its legal analysis from *Cohen* II. The *Cohen* II reasoning, as further explicated in *Cohen* IV, thus remains the law in the First Circuit and the leading example of how courts will apply Title IX to the claims of women athletes.

One of Brown's major arguments in *Cohen* IV was that:

> the significant disparity in athletics opportunities for men and women at Brown is the result of a gender-based differential in the level of interest in sports and that the district court's [ruling] requires universities to provide athletics opportunities for women to an extent that exceeds their relative interests and abilities in sports [101 F.3d at 178].

The court viewed this argument "with great suspicion" and rejected it:

> Thus, there exists the danger that, rather than providing a true measure of women's interest in sports, statistical evidence purporting to reflect women's interest instead provides only a measure of the very discrimination that is and has been the basis for women's lack of opportunity to participate in sports. . . . [E]ven if it can be empirically demonstrated that, at a particular time, women have less interest in sports than do men, such evidence, standing alone, cannot justify providing fewer athletics opportunities for women than for men. Furthermore, such evidence is completely irrelevant where, as here, viable and successful women's varsity teams have been demoted or eliminated [101 F.3d at 179-180].

Regarding Brown's obligation to remedy its Title IX violation, however, the *Cohen* IV court overruled the district court because that court "erred in substituting its own specific relief in place of Brown's statutorily permissible proposal to comply with Title IX by cutting men's teams until substantial proportionality was achieved." The appellate court "agree[d] with the district court that Brown's proposed plan fell short of a good faith effort to meet the requirements of Title IX as explicated by this court in *Cohen* II and as applied by the district court on remand." Nevertheless, it determined that cutting men's teams "is a permissible means of effectuating compliance with the statute," and that Brown should have the opportunity to submit another plan to the district court. This disposition, said the court, was driven by "our respect for academic freedom and reluctance to interject ourselves into the conduct of university affairs."

* * * * *

The Investigator's Manual cited on p. 566 of LHE 3d, as well as other publications of ED's Office for Civil Rights, can be found at OCR's web site:

http://www.ed.gov/offices/OCR

4.15.4. Discrimination on the basis of disability. The case law on Section 504's application to disabled student athletes is no longer as sparse as it once was. Two recent cases reach results opposite from that in the earlier *Wright* case (LHE 3d, p. 570).

In the first case, *Pahulu v. University of Kansas*, 897 F. Supp. 1387 (D. Kan. 1995), the plaintiff was a football player who had sustained a blow to the head during scrimmage and consequently experienced tingling and numbness in his arms and legs. After the team physician and a consulting neurosurgeon diagnosed the symptoms as transient quadriplegia caused by a congenitally narrow cervical cord, they recommended that the student be disqualified from play for his senior year -- even though he obtained the opinions of three other specialists who concluded he was fit to play. The student then sought a preliminary injunction, claiming that the university's decision violated Section 504. The court disagreed, holding on the basis of questionable reasoning that the plaintiff: (a) was not disabled within the meaning of Section 504, and (b) was not "otherwise qualified" to play football even if he was disabled. As to (a), the court reasoned that the plaintiff's physical impairment did not "substantially limit" the "major life activity" of learning, since he still retained his athletic scholarship, continued to have the same access to educational opportunities and academic resources, and could participate in the football program in some other capacity. As to (b), the court reasoned that the plaintiff did not meet the "technical standards" of the football program because he had failed to obtain medical clearance, and that:

> the conclusion of the KU physicians, although conservative, is reasonable and rational. Thus the defendants' decision regarding disqualification has a rational and reasonable basis and is supported by substantial competent evidence for which the court is unwilling to substitute its judgment [897 F.Supp. at 1394].

The second case, *Knapp v. Northwestern University*, 101 F. 3d 473 (7th Cir. 1996), uses reasoning similar to -- but more fully developed than -- that in *Pahulu* to deny relief to a basketball player who had been declared ineligible due to a heart problem. Applying the Section 504 definition of disability, the court ruled that: (a) playing intercollegiate basketball is not itself a "major life activit[y]," nor is it an integral part of "learning," which the Section 504 regulations do acknowledge to be a major life activity; (b) the plaintiff's heart problem only precludes him from performing "a particular function" and does not otherwise "substantially limit" his major life activity of learning at the university; and (c) consequently, the plaintiff is not disabled within the meaning of Section 504 and cannot claim its protections. The court also ruled that the plaintiff could not claim Section 504 protection because he was not "otherwise qualified": "Even if we were inclined to find Knapp disabled under [Section 504], he would still come up short because we also hold as a matter of law that he is not, under the statute, 'otherwise qualified' to play intercollegiate basketball at Northwestern." In reaching this conclusion, the court deferred to the university's judgment regarding the substantiality of risk and the severity of harm to the plaintiff: "[M]edical determinations of this sort are best left to team doctors and universities as long as they are made with reason and rationality and with full regard to possible and reasonable accommodations."

4.15.5. Drug testing. The U.S. Supreme Court again faced Fourth Amendment drug testing issues in *Vernonia School District 47J v. Acton*, 115 S.Ct. 2386 (1995), a case challenging the constitutionality of a public school district's *random* drug testing of student athletes. Seventh grader James Acton and his parents sued the school district after James had been barred from the school football team because he and his parents refused to sign a form consenting to random urinalysis drug testing. In an attempt to control a "sharp increase" in drug use among students, the district had implemented a policy requiring that all student athletes be tested at the beginning of each season for their sport and that thereafter 10% of the athletes be chosen at random for testing each week of the season. In a 6-3 decision, the U.S. Supreme Court reversed the U.S. Court of Appeals for the Ninth Circuit (23 F. 3d 1514 (9th Cir. 1994)) and upheld the policy.

The majority opinion by Justice Scalia relied on *Skinner v. Railway Labor Executives Ass'n* (LHE 3d p. 570) to conclude that the collection of urine samples from students is a search that must be analyzed under the reasonableness test. The majority then examined three factors to determine the reasonableness of the search: (1) "the nature of the privacy interest upon which the search . . . intrudes;" (2) "the character of the intrusion that is complained of;" and (3) "the nature and immediacy of the governmental concern at issue . . ., and the efficacy of [the drug test in] meeting it." Regarding the first factor, the Court emphasized that "particularly with regard to medical examinations and procedures," student athletes have even less an expectation of privacy than students in general due to the "communal" nature of locker rooms and the additional regulations student athletes are subject to on matters such as preseason physicals, insurance coverage, and training rules.

Regarding the second factor, the Court stated that urinalysis drug testing is not a significant invasion of the student's privacy because the process for collecting urine samples is "nearly identical to those [conditions] typically encountered in restrooms;" the information revealed by the urinalysis (what drugs, if any, are present in the student's urine) is negligible; the test results are confidential and available only to specific personnel; and the results are not turned over to law enforcement officials. And regarding the third factor, the Court determined that the school district has an "important, indeed perhaps compelling," interest in deterring schoolchildren from drug use as well as a more particular interest in protecting athletes from physical harm that could result from competing in events under the influence of drugs; that there was evidence of a crisis of disciplinary actions and "rebellion . . . being fueled by alcohol and drug abuse," which underscored the immediacy of the district's concerns; and that the drug testing policy "effectively addressed" these concerns. The plaintiffs had argued that the district could fulfill its interests by testing when it had reason to suspect a particular athlete of drug use, and that this would be a less intrusive means of effectuating the interests. The Court rejected this proposal, arguing that it:

> brings the risk that teachers will impose testing arbitrarily upon troublesome but not drug-likely students. It generates the expense of defending lawsuits that charge such arbitrary imposition, or that simply demand greater process before accusatory drug testing is imposed. And not least of all, it adds to the ever-expanding diversionary duties of schoolteachers the new function of spotting and bringing to account drug abuse, a task for which they are ill prepared, and which is not readily compatible with their vocation. . . . In many respects, we think, testing based on "suspicion" of drug use would not be better, but worse [115 S.Ct. at 2396].

Although *Vernonia* is an elementary/secondary school case, its reasonableness test and the three factors for applying it will also likely guide analysis of Fourth Amendment challenges to drug testing of student athletes at colleges and universities. Some of the considerations relevant to application of the three factors would differ for higher education, however, so it is unclear whether the balance would tip in favor of drug testing plans as it did in *Vernonia*. The Court itself takes pains to limit its holding to public elementary/secondary education:

> We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts. The most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care. [W]hen the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake [115 S.Ct. at 2396].

(On remand in *Vernonia*, the Ninth Circuit ruled on the merits that the defendant's drug testing program did not violate the Fourth Amendment or the Oregon Constitution; 66 F. 3d 217 (9th Cir. 1995).)

4.15.6. Tort liability for athletic injuries. In *Regan v. State*, 654 N.Y.S.2d 488 (N.Y. App. Div. 1997), the court addressed whether a student at a state college who suffered a broken neck while playing rugby, and was rendered a quadriplegic for life, had assumed the risk of such injury and was therefore barred from recovery against the state. The student had played and practiced with the college's Rugby Club for three years at the time of the incident. During those three years, the student had regularly practiced with student coaches on the same field where the injury occurred, and had witnessed prior rugby injuries. Relying on these factors, the court affirmed summary judgment in favor of the state, finding unpersuasive the plaintiff's contention that he was unaware of the inherent risk in playing rugby:

> The risk inherent in the sport of rugby is apparent, as is the risk inherent in football, basketball, lacrosse and other sports that involve contact. Individuals compete in such athletic events for a myriad of reasons including, but not limited to, competition, conditioning, comradery and sportsmanship. Matters involving serious injuries resulting from accidents which dramatically alter the course of a young adult's life are unsettling; however, as aptly noted by Chief Judge Cardozo in *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 166 N.E. 173, "Volenti non fit injuria. One who takes part in such sport accepts the dangers that inhere in it so far as they are obvious and necessary" (250 N.Y. 482, 166 N.E. at 173) [654 N.Y.S. 2d at 490-91].

Sec. 4.16. Student Files and Records

4.16.1. The Buckley Amendment. The "Solomon Amendment," found at section 558 of the National Defense Authorization Act for Fiscal Year 1995 (Pub. L. No. 103-337, 108 Stat. 2663 (October 5, 1994)), has implications for institutions attempting to comply with FERPA, who also receive funding from the U.S. Department of Defense. The amendment prohibits the Department of Defense from awarding a grant or contract to any institution of higher education that:

> has a policy of denying, or which effectively prevents, the Secretary of Defense from obtaining for military recruiting purposes--
> (A) entry to campuses or access to students on campus; or
> (B) access to directory information pertaining to students.

The amendment defines "directory information" as "the student's name, address, telephone listing, date and place of birth, level of education, degrees received, and the most recent previous educational institution enrolled in by the student" (sec. 558(c)). At press time, a final rule had not yet been published by the Department of Defense.

The definition of "directory information" is broader than FERPA's exemption for directory information. Also, many institutions have policies prohibiting discrimination against their students or employees on the basis of sexual orientation. The military's "don't ask, don't tell" policy conflicts squarely with these policies if they are applied to organizations who recruit on campus, as is the case at many institutions.

The final regulations to implement the FERPA amendments contained in the Higher Education Amendments of 1992 (LHE 3d, p. 578) are published at 60 Federal Register 3464 (January 17, 1995). As did the proposed regulations, the final rule excludes from the definition of "education" records the records of a law enforcement unit of an institution.

> Law enforcement unit means any individual, office, department, division or other component of an educational agency or institution, such as a unit of commissioned police officers or other non-commissioned security guards, that is officially authorized or designated by that agency or institution to --
>
> (I) Enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or
>
> (ii) Maintain the physical security and safety of the agency or the institution.

34 C.F.R. section 99.8(a)(1). As explained by the Secretary of Education, the second part of the definition "makes it clear that a security department retains its status as a 'law enforcement unit' even if it also has responsibility for enforcing the institution's code of student conduct." 60 Fed. Reg. 3466. If the law enforcement unit performs both functions, then some of the records it maintains are subject to FERPA disclosure prohibitions and some are not. 60 Fed. Reg. 3467.

In addition to defining the type of law enforcement records that are exempt from FERPA, the Secretary made it clear that "disciplinary records" would be included within the definition of "education records," thus shielding them from disclosure. In the introduction to the final rule, the Secretary noted that many commentators had objected to the inclusion of disciplinary records within FERPA's protections, but believed that the legislation did not permit such an exception.

> Based on the broad definition of "education records," which includes those records, files, documents, and other materials that contain information directly related to a student, except those that are specifically excluded by statute, all disciplinary records, including those related to non-academic or criminal misconduct by students, are "education records" subject to FERPA [60 Fed. Reg. 3465].

The 1995 amendments to the regulations also noted the exception to the disclosure prohibition enacted in 1990 by Congress as part of the Student Right-to-Know and Campus Security Act (see Section 4.17.3). This provision permits postsecondary institutions to disclose to a victim of a violent crime the results of any disciplinary proceeding against the alleged perpetrator. The Secretary of Education reasoned:

> [T]his specific statutory exception to the prior written consent rule ... demonstrates Congress' view that disciplinary records are education records under FERPA [60 Fed. Reg. 3465].

Thus, the regulations leave disciplinary records shielded from disclosure unless Congress acts otherwise:

> The Secretary remains legally constrained to conclude that records of an institution's disciplinary action or proceeding are "education records" under FERPA, not law enforcement unit records, and that excluding these records from the definition of "education records" can be accomplished only through a statutory amendment of FERPA by Congress. . . Nevertheless, because crime on our Nation's college campuses has escalated since 1974 when FERPA was enacted, the Secretary has notified Congress of the need to

> address this important issue. The Congress may find that public access to disciplinary records concerning criminal and other non-academic misconduct is an appropriate response to the problem of maintaining safe college campuses, and the Secretary has offered to work with Congress in writing an appropriate amendment to FERPA [60 Fed. Reg. 3464-3465].

The FERPA regulations were amended again in 1996 to implement the provisions of the Improving America's Schools Act of 1994 (IASA) (Pub. L. 103-382, enacted October 20, 1994). The IASA amended FERPA to require state educational agencies to give parents access to the education records they maintain. It also amended FERPA to permit disclosure of education records to officials in a state juvenile justice system as permitted by state law, and to permit disclosure of information about a disciplinary action taken against a student for behavior that posed a significant risk to the student or to others. It also permits an institution to disclose information otherwise protected by FERPA in order to comply with a judicial order or a lawfully issued subpoena, as long as the institution makes a "reasonable effort" to notify the parent or eligible student of the order or subpoena in advance. The 1996 regulations also remove the previous rule that institutions adopt a formal written student records policy (although institutions may wish to retain their policies to help avoid inconsistent practices with respect to student records).

The 1996 regulations (61 Fed. Reg. 59292 (November 21, 1996)) change the definition of "educational agency or institution" to include an agency, such as a state higher education system office, that "provides administrative control of or direction of, or performs service functions for . . . postsecondary institutions" (Sec. 99.1). The rule requires the college to make an annual notification to parents or "eligible students" of their FERPA rights. And the rule provides that, if an institution needs to disclose information "in health and safety emergencies," the institution may include in the education records that are disclosed "appropriate information concerning disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community" (Sec. 99.36(b)(1)). An appendix to the final rule includes a model notice of rights under FERPA for postsecondary institutions to use. The language of the model notice is not part of the regulations, but is advisory.

* * * * *

There has been considerable disagreement in the courts as to whether a FERPA violation may be asserted as the basis for a Section 1983 claim against a public university. In *Fay v. South Colonie Central School District*, 802 F.2d 21 (2d Cir. 1986), a federal appeals court held that FERPA "creates an interest that may be vindicated in a section 1983 action because Congress did not create so comprehensive a system of enforcing the statute as to demonstrate an intention to preclude a federal remedy under section 1983." The Fifth Circuit also recognized a Section 1983 claim grounded in FERPA in *Tarka v. Cunningham*, 917 F.2d 890 (5th Cir. 1990).

In the same year that *Krebs* (LHE 3d, pp. 578-579) was decided, the U.S. Supreme Court issued a decision on Section 1983 enforceability of federal statutes. In *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), the Court held that when a plaintiff seeks to invoke Section 1983 to enforce a statute enacted under Congress' spending power, the issue is whether Congress "unambiguously conferred" upon the beneficiaries of the statute a right to enforce its requirements. In *Maynard v. Greater Hoyt School District*, 876 F. Supp. 1104 (S.D. 1995), relying on *Suter*, the federal district court allowed a Section 1983 action based on FERPA to proceed:

> The enforcement scheme set up by FERPA cuts off all federal funds to any educational agency that violates FERPA. It is obvious that the available sanction does not provide a remedy to the plaintiffs for the alleged violation of FERPA .... [876 F. Supp. at 1107].

In *Flannery v. Board of Trustees of Illinois Community College*, No. 96-C-50148, 1996 U.S. Dist. LEXIS 17049 (N.D. Ill. Nov. 4, 1996), another federal district court agreed with this analysis, but cited the language of that statute and *Krebs* in cautioning the plaintiff that she must show a "pattern or practice" of disclosing information in violation of FERPA to prevail. Thus, if a plaintiff complains of a single incident, there may be no FERPA violation. See also *Abrams v. Mary Washington College*, 33 Va. Cir. 449 (Va. Circuit Court 1994) (citing *Krebs* and holding that an "isolated incident" of alleged disclosure does not rise to a FERPA violation).

Other courts have relied on *Suter* and rejected actions which seek to privately enforce FERPA through Section 1983. In *Gundlach v. University of Pennsylvania*, 924 F. Supp 684 (E.D. Pa. 1996), *affirmed*, 114 F. 3d 1172 (3d Cir. 1997), the court used this rationale:

> In view of *Suter*, we conclude that Mr. Gundlach cannot seek redress pursuant to a FERPA-based Section 1983 claim under the facts alleged in support of the proposed claim. . . . *Suter* requires an examination of the statute to determine "exactly what is required" by the participating institutions...A careful reading of [FERPA] reveals a Congressional intention to impose a mandatory obligation on participating institutions, such that it may not have in place "a policy or practice of permitting the release of education records." ... Thus the requirement placed on the participating institution is not that it must prevent the unauthorized release of education records, as Mr. Gundlach contends, but that it cannot improperly release such records as a matter of policy or practice. The court in *Smith v. Dusquene Univ.*, 612 F. Supp. 72 (W.D. Pa. 1985), *aff'd without op.*, 787 F.2d 583 (1986), recognized as much when it concluded that "FERPA was adopted to address systematic, not individual, violations of students' privacy and confidentiality rights through unauthorized releases of sensitive educational records." ... Thus, we glean no unambiguous intention on the part of Congress to permit the invocation of Section 1983 to redress an individual release of records allegedly covered by FERPA [924 F. Supp. at 692].

The ambiguity of the law is troubling not only for determining whether a Section 1983 violation has occurred, but also for whether a defense of immunity precludes recovery (see LHE 3d, Section 2.4.3). The primary inquiry in deciding whether a defendant is entitled to qualified immunity is whether, when the defendant acted, he or she was violating a "clearly established right." In the highly publicized *Brown v. City of Oneonta*, 106 F.3d 1125 (2d Cir. 1997), a federal court of appeals held that it was unclear in 1992 whether FERPA's "emergency exception" allowed release of information requested by local police. In that case, the FERPA dispute began with an elderly woman being attacked in the bedroom of a private home by an unknown assailant with a knife. She believed her assailant to be a young black man. In the course of the attack, the assailant also was cut with the knife and fled toward the campus of the State University of New York College at Oneonta. The police canine unit tracked the perpetrator's trail to a wooded area at the base of the campus. Local police requested that the university immediately provide a list of black male students, citing community and student safety concerns. The university compiled. Based on that list, police questioned students on the list and examined their hands. No suspect was arrested; students on the list instituted this FERPA action shortly thereafter.

The institutional defendants justified their actions in creating and providing the list under the "emergency" exception to FERPA, which allows release of information to appropriate persons to protect health or safety in an emergency. The Second Circuit reversed the district court and found that the defendants enjoyed qualified immunity for their actions. The court found that FERPA was unclear in 1992 (when the defendants acted) as to the application of the emergency exception. Furthermore, the court held that under these exigent circumstances, it was "objectively reasonable" for the defendants to provide police with the list. Under either of these conditions, the qualified immunity defense would protect the university from any potential FERPA violation. Given the court's application of the immunity doctrine, the case does not clarify the extent of the emergency exception.

4.16.2. State law. Some state statutes requiring disclosure of certain records may conflict with FERPA. Where suit is not brought under FERPA but instead asserts only state law claims, federal courts may not have subject matter jurisdiction. In *Gannett River States Publishing Corp. v. Mississippi State University*, 945 F. Supp. 128 (S.D. Miss. 1996), the federal district court refused to retain an action based on the Mississippi Public Records Act (Miss. Code Ann. Sections 25-61-1 through 25-61-17). Although the plaintiff had filed suit for disclosure of records in state court, the university had removed the action to federal court based on federal question jurisdiction. The university reasoned that the plaintiff's claims were federal in nature because, as it contended, it was FERPA which prevented the release of the records sought. Even the plaintiff's complaint explicitly mentioned FERPA and disputed its applicability to the records at hand. The federal court remanded the case back to state court, citing long established jurisprudence concerning federal jurisdiction. The court held that state law, not FERPA, was the basis for the plaintiff's claim and thus the suit did not "arise under" federal law. The court explained that any reference to FERPA did not convert the matter from one of federal law to one of state law; mentioning FERPA in the complaint was simply an "anticipation" of the university's defense. This case is an interesting reminder to institutional defendants that, in the absence of diversity jurisdiction, the substance of the plaintiff's complaint may determine the forum in which disclosure issues are decided.

* * * * *

State courts are differing sharply in their attempts to interrelate the provisions of FERPA with state open records laws. For example, a Connecticut appellate court addressed the claim under Connecticut's Freedom of Information law that audio tapes of a student disciplinary hearing were public records and thus their disclosure was required. In *Eastern Connecticut State University v. Connecticut Freedom of Information Commission*, No. CV96-0556097, 1996 Conn. Super. LEXIS 2554 (Conn. Super., September 30, 1996), a faculty member who had filed disciplinary charges against a student enrolled in his class requested audio tapes of the hearing that had been held to adjudicate those charges. The college had refused, citing FERPA's provision that records of disciplinary hearings are protected by FERPA from disclosure unless the student consents. Although the Freedom of Information Commission (FOIC) had found the hearings to fall squarely within FERPA's protection, it also found that the faculty member had a legitimate educational interest in the student's behavior, and thus was entitled to the information under another FERPA provision (20 U.S.C. 1232g(h) and 34 C.F.R. 99.3). The court held that FERPA did not prevent a state legislature from enacting a law providing for access to public records, and that FERPA does not prohibit disclosing the student records, but that nondisclosure is "merely a precondition for federal funds." Taken to its logical conclusion, this ruling would elevate the interest of the public in access to public records over the ability of the state institution to be eligible to receive Federal funds.

A second state court differed sharply with the result in Connecticut. In *Shreveport Professional Chapter of the Society of Professional Journalists v. Louisiana State University*, No. 393,334, (1st Judicial Dist. Ct. Caddo Parish, La. March 4, 1994) (unpublished opinion at 17), the court found that the results of a disciplinary hearing concerning theft of student government funds by student government members were more like education records (protected by FERPA) than law enforcement records (not protected by FERPA). The court rejected the plaintiffs' claim that FERPA did not prohibit disclosure of disciplinary hearing records, stating, "[T]he intent of Congress to withhold millions of federal dollars from universities that violate [FERPA] is ample prohibition, regardless of how the word 'prohibit' is construed by the plaintiffs." Although the court determined that the disciplinary hearing records were subject to the state's public records act, the court ruled that, given FERPA's requirements, the state constitution provided for an implied exception in the law for college disciplinary hearings. Distinguishing *Red & Black* (LHE 3d, p. 699) on several grounds, the court held that the records should not be disclosed.

Despite the clarity of the FERPA regulations in including disciplinary records within the definition of education record, at least two state courts have permitted disclosure of disciplinary documents on the basis they were not "educational records." The Supreme Court of Ohio held in *State ex rel Miami Student v. Miami University*, 680 N.E. 2d 956 (Ohio 1997), that university disciplinary records are not education records under FERPA. The editor of the university's student newspaper had sought student disciplinary records, redacted of the students' names, social security numbers, and student identification numbers, or any other information that would identify individual students. The university provided the information, but, in addition to the redactions that the editor had agreed to, also deleted information on the sex and age of the accused individuals, the date, time and location of the incidents, and memoranda, statements by students, and the disposition of some of the proceedings. The editor sought a writ of mandamus from the state supreme court. As in *Colonial School District*, the majority opinion did not cite or analyze the 1995 amendments to the regulations or, for that matter, any of the implementing regulations. Instead, the opinion analyzed the *Red & Black* case and determined that disciplinary records were not related to "student academic performance, financial aid, or scholastic probation," and thus could be disclosed without violating FERPA. Noting that the public records act was intended to be interpreted broadly, the court also noted that crime on campus was a serious problem and that the public should have access to the information requested by the student editor.

One justice dissented from the court's ruling that the information sought was not an education record, stating that the court's conclusion was "clearly contrary to the history, language and intent of FERPA." Noting that the *Red & Black* case was decided prior to the 1995 amendments (in which the Secretary of Education specifically included disciplinary records within the definition of education records), the judge noted that *Shreveport* was a more recent analysis of the conflict, suggesting that it was the better authority. It appears that Congressional action will be necessary to resolve this conflict between state public records laws and FERPA.

* * * * *

Some state disclosure laws may not prove as all encompassing as they initially appear. In *Becky v. Butte-Silver Bow School District*, 906 P.2d 193 (Mont. 1995), the Supreme Court of Montana held that evaluations of a student made by his teachers and used for determining his eligibility for the National Honor Society did not come within the definition of a "document of a public body" because the records were not created by the school district itself nor "related to the functions and duties" of the school district. Thus, the court upheld the lower court's denial of a writ compelling disclosure.

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For a discussion of a variety of lawsuits under FERPA, see Ralph D. Mawdsley, "Litigation Involving FERPA," 110 *West's Education Law Rptr.* 897 (1996).

Sec. 4.17. Campus Security

4.17.1. Security officers. With respect to religious institutions, at least one court has viewed the issue of granting police power to security guards with disfavor. In *State of North Carolina v. Pendleton*, 451 S.E.2d 274 (N.C. 1994), Pendleton was arrested by a Campbell University police officer on a public highway for driving while impaired. Pendleton moved to dismiss the charge alleging that the statute giving the officer arrest powers was unconstitutional under the First Amendment because it permitted an employee of a religious institution to exercise the police power of the State. Applying *Lemon v. Kurtzman* (LHE 3d, Section 1.6, p. 59), the North Carolina Supreme Court agreed and held that police power is an affair of the government, not to be delegated to a religious instititution.

The dissent focussed on Campbell University as an institution of higher learning, buttressing its rationale with the fact that its Board governs the University's affairs and not religious matters. It reasoned that a majority of the goals stated by Campbell University were of a secular nature, that the operation of the police power was proscribed with standards for the University to follow and, therefore, that the enabling statute was not unconstitutional. *Compare, Commonwealth v. Mullen*, 664 N.E.2d 854 (App. Ct. Mass. 1996) (holding that campus police officer at Fitchburg State College did not have authority under *state law* to stop driver for civil motor vehicle violation and that subsequent arrest for driving under the influence was therefore not justified).

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In *Baughman v. State*, 45 Cal. Rptr. 2d 82 (Cal. App. 1995), university police were sued for an invasion of privacy, emotional distress, and conversion pursuant to the destruction of computer disks during a search undertaken in connection with a lawfully issued warrant. The court found that the officers had acted within their official capacity, that they were therefore immune from damages resulting from the investigation, and that the investigation justified an invasion of privacy.

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Baris v. State (LHE 3d, p. 582) has been overruled in part by *Coopley v. Director of Revenue*, 896 S.W.2d 468 (Mo. 1995).

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For more information on campus security, *see* J.S. Jacobson, "The Model Campus Police Jurisdiction Act: Toward Broader Jurisdiction for University Police," 29 *Columbia J. of Law and Social Problems* 39 (1995).

4.17.2. Protection against violent crime on campus. Subsequent Florida cases and legislative amendments have superseded the result in *Relyea* (LHE 3d, p. 586). See, for example, *Pensacola Junior College v. Montgomery*, 539 So.2d 1153 (Fla. Ct. App. 1989) (state college has limited liability under Florida law).

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In *Johnson v. State*, 894 P.2d 1366 (Wash. Ct. App. 1995), where a student was raped outside her residence hall, the court held that she was an invitee to whom the university owed a duty of care for her safety but that no special duty was owed her because she was a student or was required to live on campus. However, the court also held that the rape was not unforeseeable as a matter of law. The court held that there were material issues of fact which precluded summary judgment.

In *Laura O. v. State*, 610 N.Y.S.2d 826 (N.Y. App. Div. 1994), a New York university was found not liable with regard to a student who was raped in a campus music building after hours. She had been practicing the piano at a time when students were not allowed in the building. Although the student claimed that university officials knew that students used non-dormitory buildings after closing hours, the court stated that the university's security procedures were appropriate and that it was acting in its governmental capacity, not a proprietary capacity. Since there was no evidence that the university owed the student a special duty of protection (since the building was not a residence hall and she was not a campus resident), no liability was found.

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For further analysis of institutional liability with regard to rapes which occur on campus, see R. Fossey and M.C. Smith, "Institutional Liability for Campus Rapes: The Emerging Law," 24 *J. of Law and Educ.* 377 (1995).

4.17.3. Federal statutes and campus security. The U.S. Department of Education has issued its first charge against a college for violating the Campus Security Act. In September of 1996, the Department of Education released a report citing Moorhead State University for violating the Campus Security Act by compiling inaccurate crime statistics and not making annual crime reports public. The Department did not impose any sanctions but threatened possible penalties if the university did not comply with the law within 30 days. The statute provides a range of punishments, including the withdrawal of all federal funds, which may be imposed on institutions that violate the law. Although the Department has not strictly enforced the law to date, a 1996 resolution passed by the House of Representatives urging better enforcement may prompt the Department to scrutinize institutional reporting practices more closely. Karla Haworth, "Education Department Finds a College Violated U.S. Crime-Reporting Law," *The Chronicle of Higher Education*, September 27, 1996, A44.

Sec. 4.18. [new section]. Free Speech on Campus Computer Networks

Increasingly, free speech on campus is enhanced, and free speech issues are compounded, by the growth of technology. Cable and satellite transmission technologies, for instance, are having such an effect on some campuses. But the clearest and most important example -- now and for the foreseeable future -- is computer technology. Computer labs, campus LAN's, and Internet gateways have assumed a pervasive presence on most campuses, and are used increasingly by students for e-mail communications, discussion groups, research, access to information on campus activities and services, and entertainment. Students may be both senders (speakers) and receivers (listeners); their purposes may be related to coursework or extracurricular activities, or may be purely personal; and their communications may be local (within the institution) or may extend around the world.

As the amount, variety, and distance of computer communications have increased, so have the development of institutional computer use policies and other institutional responses to perceived problems. The problems may be of the "traffic cop" variety, occasioning a need for the institution to allocate its limited computer resources by directing traffic to prevent traffic jams. Or the problems may be more controversial, raising computer misuse issues such as defamation, harassment, threats, hate speech, copyright infringement, and academic dishonesty. The latter types of problems may present more difficult legal issues, since institutional regulations attempting to alleviate these problems may be viewed as content-based restrictions on speech.

Public institutions, therefore, must keep a watchful eye on the First Amendment when drafting and enforcing computer use policies. Just as federal and state legislation regulating computer communications may be invalidated under the free speech and press clauses (*see* this Supp., Section 7.2.18), particular provisions of campus regulations can be struck as well is they contravene these clauses. Although private institutions are not similarly bound (*see* LHE 3d, Section 1.5.2), they may voluntarily protect student free expression through student codes or bills of rights, or computer use policies themselves, or through campus custom -- or may be bound by state statutes or regulations to protect free expression; thus administrators at private institutions will also need to be keenly aware of First Amendment developments regarding computer speech.

Under existing First Amendment principles (*see* generally LHE 3d, Sections 4.9.1, 4.9.2, and 4.10), administrators should ask four main questions when devising new computer use policies, or when reviewing or applying existing policies: (1) Are we seeking to regulate, or do we regulate, the *content* of computer speech ("cyberspace speech")? (2) If a particular regulation is content-based, does it fit into any First Amendment exceptions that permit content-based regulations -- in particular the exceptions for obscenity, child pornography, fraudulent commercial representations, purely private defamation, or "true" threats? (3) (A) Does our institution own the computer hardware or software being used for the computer speech; and (B) if so, has our institution created "forums" for discussion on the computer networks it owns? (4) Are our regulations or proposed regulations clear, specific, and narrow?

For question 1, if a computer use policy regulates the content of speech -- that is, the ideas, opinions, or viewpoints expressed -- the courts will usually subject the regulation to a two-part standard of "strict scrutiny": (1) does the content regulation further a "compelling" governmental interest, and (2) is the regulation "narrowly tailored" and "necessary" to achieve this interest? The need to act in cases of copyright infringement, bribery, blackmail, stalking, or other violations of federal and state law may often be considered compelling interests, as may the need to protect the institution's academic integrity when computers are used for "cheating;" regulations furthering these interests may therefore meet the strict scrutiny standard if they are very carefully drawn. But otherwise the standard is extremely difficult to meet. In contrast, if a computer regulation serves "neutral" government interests not based on the content of speech (for example, routine "traffic cop" regulations), a less stringent and easier-to-meet standard would apply.

Regarding question 2, if the restriction on computer speech is content-based, and thus extremely difficult to justify under the strict scrutiny standard, it would still be able to survive if it falls into one of the First Amendment exceptions. In *United States v. Baker*, 890 F.Supp. 1375 (E.D. Mich.), *affirmed on other grounds*, 104 F.3d 1492 (6th Cir. 1997), for example, the district court acknowledged that "true threats" are not protected by the free speech clause but then ruled that the defendant-student's computer e-mail messages did not constitute a "true threat." (The *Baker* case is further discussed in the Supp., Section 7.2.18.2). Another example is obscenity, recognized in numerous cases, including computer cases, as an exception to the First Amendment (see LHE 3d, Section 7.2.18, and see generally Section 4.13.3). But all these exceptions are technical and narrow, and collectively would cover only a portion of the computer speech that an institution might wish to limit.

Regarding question 3, institutions may be in a stronger regulatory position when they restrict the use of *their own* computers, computer programs, or networks for speech purposes; the First Amendment standards would be low and would generally permit content-based restrictions (regardless of whether they fall into one of the exceptions) other than those based on the particular viewpoint of the speaker. But these lesser standards apparently would not apply to circumstances in which the institution had used some portion of the computers, programs, or networks it owns to create an open or public "forum" for expression by students or by the campus community. In such circumstances, under the "public forum doctrine," the First Amendment prohibition on content restrictions would continue to apply unless the institution could fit within an exception. See Joseph Beckham and William Schmid, "Forum Analysis in Cyberspace: The Case of Public Sector Higher Education," 98 *West's Education Law Rptr*. (May 18, 1995).

The case of *Loving v. Boren*, 956 F.Supp. 953 (W.D. Okla. 1997), provides the first example of public forum analysis being applied to a university computer system. The University of Oklahoma was concerned that some of the Internet news groups on the university news server were carrying obscene material. Consequently, the university adopted an access policy under which the university operated two new servers, A and B. The A server's content is limited to those news groups that have not been "blocked" or disapproved by the university; the B server's news group content is not limited. The A server is generally accessible to the university community for recreational as well as academic purposes; the B server, on the other hand, may be used only for academic and research purposes, and then only by persons over age 18. Although the court rejected a free speech clause challenge to this policy, it did so on the basis of conclusory reasoning that reflects an incomplete understanding of the public forum doctrine. One conclusion the court reaches, however, does appear to be valid and important: the restriction of the B server to academic and research purposes does not violate the First Amendment because "[a] university is by its nature dedicated to research and academic purposes" and "those purposes are the very ones for which the [computer] system was purchased" (956 F.Supp. at 955). The court apparently reaches this conclusion because it does not view any part of the university's computer services as a public forum. The better view, however, is probably that the B server is a "limited forum" which the university has dedicated to academic use by restricting the purposes of use rather than the content as such. On this reasoning, the court should have proceeded to give separate consideration to the question of whether the A server was a public forum and, if so, whether its content could be limited as provided in the university's policy.[2]

Under question 4 in the list above, the focus is on the actual wording of each regulatory provision in the computer use policy. Even if a particular provision has been devised in conformance with the First Amendment principles addressed in questions 1 through 3, it must in addition be drafted with a precision sufficient to meet constitutional standards of narrowness and clarity. If it does not, it will be subject to invalidation under either the

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[2] There are also other potential issues that the court did not address separately: whether the B server could be restricted to persons over age 18 (see generally the *Reno* case in this Supp., Section 7.2.18.1); and whether the standards and procedures for blocking materials from the A server were constitutionally sufficient (see generally LHE 3d, Section 4.13.3).

"overbreadth" doctrine or the "vagueness" doctrine (see generally LHE 3d, Section 4.6.1).

One may fairly ask whether all these existing First Amendment principles should apply to the vast new world of cyberspace. Indeed, scholars and judges have been debating whether free speech and press law will apply in full to computer technology. See, e.g., Lawrence Lessig, "The Path of Cyberlaw," 104 *Yale L.J.* 1743 (1995). Although courts are committed to taking account of the unique aspects of each new communications technology, and allowing First Amendment law to grow and adapt in the process, it appears unlikely that the basic principles discussed above will be discarded or radically transformed when applied to cyberspace. In fact, in the leading case to date, *American Civil Liberties Union v. Reno* (this Supp., Section 7.2.18), the district court and U.S. Supreme Court opinions relied explicitly on the principles referenced in questions 1, 2, and 4 above; and one of the district court judges (Dalzell) also dwelt at length on the "forum" aspects of the Internet. Thus, although administrators will need to follow both legal and technological developments closely in this fast-moving area, they should work from the premise that basic First Amendment principles are their authoritative guides.

To avoid First Amendment liability arising from institutional regulation of campus computer speech, administrators should follow the four guidelines suggested above. In addition, public institutions might adopt an analogy to student newspapers to limit institutional liability for their students' uses of cyberspace. To adopt this analogy, the institution would consider student web sites, bulletin boards, or discussion lists to be like student newspapers, and would provide them a freedom from regulation and oversight sufficient to assure that the students are not viewed as agents of the institution (*see* LHE 3d, Section 4.13.2 (pp. 541-542) & Section 4.13.4 (pp.546-548)). Institutions might also create alternatives to regulation that would either diminish the likelihood of computer abuse or enhance the likelihood that disputes which do arise can be resolved without litigation. For instance, institutions could encourage, formally and informally, the development of cyberspace ethics codes for their campus communities. For a foundation for such a code, *see* Marjorie Hodges & Gary Pavela, "Ten Principles of Civility in Cyberspace," and "Civility in Cyberspace" (Pavela interviewing Hodges), in *Synthesis: Law and Policy in Higher Education* 624, 631 (vol. 8, no. 4, Sp. 1997). To a large extent, the success of such codes would depend on widespread consensus about the norms established and willingness to enforce them by peer pressure and cyberspace "counterspeech." Another helpful initiative might be for institutions to provide a mediation or arbitration process adapted to the context of cyberspace. Such a process could be conducted using outside assistance, perhaps even on-line assistance. Two web sites to consult regarding dispute resolution are: <http://vmag.law.vill.edu: 8080 (The Virtual Magistrate Project) and <http://www.ombuds.org (The Online Ombuds Office). Other suggestions about campus computer policies can be found at:

http://www.ucop.edu/ucophome/policies/email/

and

http://wwwbookstore.ucdavis.edu/SJA/AUPtips.html

and

http://www.cause.org/information-resources/ir-library/html/cem9642.html

Selected Annotated Bibliography

Sec. 4.2 (Admissions)

Association of American Medical Colleges. *The Americans with Disabilities Act (ADA) and the Disabled Student in Medical School: Guidelines for Medical Schools.* Provides information on federal disability discrimination laws and their requirements, as well as summaries of relevant case law. Discusses "essential functions" and policy issues for medical schools to consider as they review their admissions policies.

Browne-Miller, Angela. *Shameful Admissions: The Losing Battle to Serve Everyone in our Universities.* San Francisco: Jossey-Bass, 1995. Discusses the history of affirmative action in admissions at the University of California-Berkeley. Includes suggestions for providing equal opportunity to students.

Crockett, Richard B., & Shelley Sanders Kehl. *Accommodating Students with Learning and Emotional Disabilities: A Legal Compendium* (National Association of College and University Attorneys, 1996). Reprints from law and social science journals, as well as conference outlines, on the requirements of Section 504 and the ADA; the accommodation of learning disabilities and emotional disabilities; and on the characteristics of certain learning disabilities. Also includes material on how the laws are enforced, institutional policies and handbooks on accommodating disabled students, and several guides for faculty concerning assisting disabled students.

Heffernan, Elizabeth B. and Bazluke, Francine T. *Minority-Targeted Admissions and Financial Aid Programs*. Washington, DC: National Association of College and University Attorneys, 1996. Presents several issues related to the use of voluntary, race-conscious measures for admissions and financial aid, including OCR policy and enforcement, private enforcement, and judicial review.

Stokes, Jerome W.D. and Groves, Allen W. "Rescinding Offers of Admission When Prior Criminality is Revealed." 105 *West Education Law Rptr.* 855 (1996). Discusses tort liability and other theories related to the rescission of offers of admission to students.

Sec. 4.3 (Financial Aid)

McDaniel, Diane L. and Tanaka, Paul. *The Permissibility of Withholding Transcripts Under Bankruptcy Law*, 2d ed. Washington, DC: National Association of College and University Attorneys, 1995. Discusses relevant provisions of federal bankruptcy law and their implications for withholding a transcript during or following a bankruptcy action.

NACUBO. *Audits of Federal Student Financial Aid (SFA) Programs*. Washington, DC: National Association of College and University Business Officers, 1995. A two-volume guide to administering federal student financial aid programs, including eligibility issues, cash management, financial disclosure requirements, and compliance requirements for each federal program.

Somers, Patricia and Hollis, James M. "Student Loan Discharge Through Bankruptcy." 4 *Am. Bankr. Inst. L. Rev.* 457 (1996).

See Heffernan & Bazluke entry for Section 4.2.

Sec. 4.7 (Grades, Credits and Degrees)

Paludi, Michele A., ed. *Sexual Harassment on College Campuses: Abusing the Ivory Power*. Albany: SUNY Press, 1996. Provides an overview of sexual harassment law, discusses "consensual" relationships between faculty and students, and proposes a variety of campus interventions for dealing with harassment.

Sec. 4.8 (Procedures for Suspension, Dismissal and Other Sanctions)

Cole, Elsa Kircher. *Selected Legal Issues Relating to Due Process and Liability in Higher Education.* Washington, DC: Council of Graduate Schools, 1994. A pamphlet designed for faculty and academic advisors that reviews the basics of due process in dealing with academic misconduct or discipline problems. Also covers termination of faculty, scientific misconduct, and privacy of student records.

Sec. 4.10 (Hate Speech)

Coleman, Arthur L., & Alger, Jonathan R. "Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom from Discrimination on University Campuses," 23 *J.C. & U.L.* 91 (1996). Describes how an educational environment that is free from discrimination and therefore conducive to learning is mutually supportive of an educational environment in which a free and robust exchange of ideas takes place. The article provides a comprehensive review of both free speech and anti-discrimination law and, by applying these fundamental principles of law to scenarios likely to arise in colleges and universities, attempts to display how they need not be mutually exclusive in the setting of higher education.

Dry, Murray. "Hate Speech and the Constitution," 11 *Const. Comment.* 501 (1994-95). Analyzes the U.S. Supreme Court's decisions in *R.A.V. v. St. Paul* and *Wisconsin v. Mitchell.* Seeks to explain the purported conflict between the two opinions of the Court as they impact colleges and universities.

Grey, Thomas, *How to Write a Speech Code Without Really Trying: Reflections on the Stanford Experience. 29 U.C. Davis L.Rev.* 891 (1996). Part of a symposium entitled Developments in Free Speech Doctrine: Charting the Nexus Between Speech and Religion, Abortion, and Equality. Provides an analysis of Stanford's policy on Free Expression and Discriminatory Harassment which was struck down by a California trial court.

Sec. 4.11 (Student Organizations)

Paulsen, Michael. *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups. 29 U.C. Davis L.Rev.* 653 (1996). Part of a symposium entitled Developments in Free Speech Doctrine: Charting the Nexus Between Speech and Religion, Abortion, and Equality. In light of *Rosenberger v. Rectors and Visitors of the University of Virginia*, examines the rejection of the premise that the establishment clause creates an exception to First Amendment free speech principles when the speech or speaker in question is of a religious nature.

Sec. 4.13 (Student Press)

Student Press Law Center. Law of the Student Press (2d ed., Student Press Law Center Inc., 1994). Surveys the legal rights and responsibilities of high school and college journalists. Contains extensive discussion of freedom of press and its limits in the education context, including discussion of defamation, invasion of privacy, obscenity, the "underground" press, and electronic media.

Ugland, Erik Forde. "Hawkers, Thieves and Lonely Pamphleteers: Distributing Publications in the University Marketplace," 22 *J. Coll. & Univ. Law* 935 (1996). Discusses First Amendment implications for universities, students, and taxpaying public of the distribution of publications on college campuses. Argues that the constitutional and practical problems which arise from efforts to restrict distribution require a "marketplace" approach whereby the issue is dealt with as a constitutional, not an administrative, problem

Sec. 4.15 (Athletics)

Symposium, "Gender & Sports: Setting a Course for College Athletics." *3 Duke J. Gender L. & Pol'y 1-264 (1996).* Provides various perspectives on the effect of Title IX in combating unequal athletic opportunity in the realm of intercollegiate athletics. Contains six articles: Brian Snow and William Thro, "Still on the Sidelines; Developing the Non-Discrimination Paradigm Under Title IX;" Deborah Brake & Elizabeth Catlin, "The Path of Most Resistance:

The Long Road Toward Gender Equity in Intercollegiate Athletics;" Mary Jo Kane, "Media Coverage of the Post Title IX Female Athlete: A Feminist Analysis of Sport, Gender, and Power;" Jeffrey Orleans, "An End to the Odyssey: Equal Athletic Opportunity for Women;" Mary Gray, "The Concept of Substantial Proportionality in Title IX Athletics Cases;" and John Weistart, "Can Gender Equity Find a Place in Commercialized College Sports?".

Sec. 4.16 (Student Files and Records)

AACRAO, *Guidelines for Postsecondary Institutions for Implementation of the Family Educational Rights Act of 1974 as Amended.* Madison, WI: Magna Publications, 1995. Provides an overview of the Act and discusses specific issues and problems that college administrators have encountered. A copy of the Act, its regulations, and sample compliance documents are included as appendices.

Sec. 4.17 (Campus Security)

Kirkland, Connie J. and Siegel, Dorothy G., *Campus Security: A First Look at Promising Practices*, Washington, DC: U.S. Dept. of Education, Office of Educational Research and Improvement, 1994. Provides advice on establishing and evaluating campus security programs. Discusses eleven areas that security officials should address and reviews security practices from a variety of institutions.

Siegel, Dorothy. *Campuses Respond to Violent Tragedy.* Washington, DC: ACE-Oryx, 1994. Describes how several institutions have responded to violence on campus, discusses lessons learned from successful and unsuccessful responses.

Sec. 4.18 [new section] (Free Speech on Campus Computer Networks)

Symposium, "Emerging Media Technology and the First Amendment," *104 Yale L. J.* 1613 (1994), provides various perspectives on the role of freedom of expression in the technological revolution. Contains a foreword by Owen Fiss, "In Search of a New Paradigm," followed by seven commentaries: (1) Jerry Berman and Daniel J. Weitzner, "Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media," (2) Anne Wells Branscomb, "Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspace;" (3) M. Ethan Katsh, "Rights, Camera, Action: Cyberspatial Settings and the First Amendment;" (4) Thomas G. Krattenmaker and L.A. Powe, Jr., "Converging First Amendment Principles for Converging Communications Media;" (5) Lawrence Lessig, "The Path of Cyberlaw;" (6) Cass R. Sunstein, "The First Amendment in Cyberspace;" and (7) Eugene Volokh, "Cheap Speech and What it Will Do."

V

The College and the Community

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Sec. 5.1. General Principles

The case of *Lexington-Fayette Urban County Board of Health v. Board of Trustees of the University of Kentucky*, 879 S.W. 2d 485 (Ky. 1994), is a good recent illustration of the potential conflict between state institutions and the local governments whose jurisdictions they occupy. The case posed two sets of questions, one concerning the Board of Health's authority to enforce *state* health laws and regulations against the university, and the second concerning the Board of Health's authority to enact and enforce *local* health laws and regulations against the university. The university conceded that the Board of Health had authority with respect to state health laws, but strenuously argued that there was no such authority regarding local health laws. Controversy concerning the latter issue arose when the Board of Health sought to inspect a recreational facility (the "Spa Pool") being constructed by the university, and to enforce local health regulations concerning the construction of such facilities. The Supreme Court of Kentucky agreed with the university. According to the court:

> We agree, and the University concedes, that the Board of Health is the enforcement agent for the Cabinet for Human Resources and has the authority to inspect and enforce state health laws and state health regulations against the University. However, we do not believe that when the legislature designated the Board of Health as the enforcement agent of the Cabinet for Human Resources that the legislature intended to grant the Board of Health authority to enforce local health laws or enact local regulations against state agencies . . . .
>
> Even though the Board of Health was created by an urban-county government, it has only the powers granted to it by the legislature . . . . [I]t is our opinion that the legislature has not made clear its intention to grant authority to the Board of Health to enact and enforce local health laws or local regulations against state agencies, including the university [879 S.W. 2d at 485-486, 487].

Sec. 5.2. Zoning and Land Use Regulation

5.2.3. Private institutions and zoning regulations. Private colleges may find that preservation law and regulations, as well as zoning ordinances, limit the use of their property. For example, in *In the Matter of Canisius College v. City of Buffalo*, 629 N.Y.S.2d 886 (N.Y. App. Div. 1995), the college had planned to raze a former rectory and use the property for student parking. A preservation group applied for landmark status for the building, and the Buffalo Common Council approved landmark designation, despite a negative recommendation by the Preservation Board. The college challenged the Council's action, asserting that it was arbitrary and capricious, lacked a rational basis, and was an unconstitutional taking of its property. The intermediate appellate court rejected the college's claims, asserting that the Council's action had a reasonable basis in law and was neither arbitrary nor capricious. Furthermore, said the court, there was no evidence that designating the rectory as a landmark prevented the college from carrying out its charitable purposes.

5.2.7. Rights of other property owners. In a continuation of the neighborhood challenge to American University's decision to build a new law school (LHE 3d, p. 620), the District of Columbia courts have ruled consistently in the university's favor. In *Spring Valley Wesley Heights Citizens Association v. District of Columbia Board of Zoning Adjustment*, 644 A.2d 434 (D.C. 1994), the D.C. Court of Appeals held that because a college or university can locate in a commercially-zoned area as a matter of right, the zoning board had no jurisdiction to prohibit the university from locating its new law school in an area zoned for commercial development. In a related case, *Duke v. The American University*, 675 A.2d 26 (D.C. 1996), the court rejected the claim of individuals living near the university that the university had entered an agreement with some neighborhood organizations promising not to build its new law school in the neighborhood. The court found that no such agreement had been made, either orally or in writing.

5.2.8. Zoning off-campus housing. Another community has failed in its attempt to regulate "mini-dorms" with restrictions similar to those rejected in *Kirsch v. Prince Georges County* (LHE 3d, pp. 620-621). In *College Area Renters and Landlord Association v. City of San Diego*, 50 Cal. Rptr. 2d 515 (Cal. App. 1996), a municipal ordinance regulated the number of individuals over age 18 who could live in a non-owner occupied residence in certain areas of the city, based upon the number of rooms and their square footage, the amount of parking per inhabitant, and the size of rooms that were not bedrooms. The ordinance did not apply to owner-occupied housing. A group of renters and landlords (CARLA) challenged the law under the California Constitution's equal protection clause, as well as under constitutional privacy and pre-emption theories. The court, affirming a lower court's summary judgment for the plaintiffs, ruled that renters and homeowners were similarly situated with respect to the problems that the ordinance sought to ameliorate -- noise, congestion, and littering:

> [B]oth groups can overcrowd a neighborhood . . . . [W]e are not persuaded that there is a sufficient relationship between the non owner-occupied classification and the overcrowding problem, so as to justify imposing occupancy restrictions on tenant residents that do not apply to neighboring owner residents [50 Cal. Rptr. 2d at 520].

Although the court declined to reach the plaintiffs' other claims, it stated in dicta that there was a possible pre-emption problem because state occupancy standards were more lenient than those of the ordinance, and that the city should follow the statewide standards in dealing with the problem of overcrowding. The court also added, again in dicta, that the ordinance could trigger privacy concerns and thus should be upheld only if there were a compelling public need.

Sec. 5.3. Local Government Taxation

5.3.2. Property taxes. An Illinois case provides another example of an issue concerning the taxability of real property held by a separate entity established by a higher educational institution (see LHE 3d, pp. 629-630). *Illini Media Company v. Illinois Department of Revenue*, 664 N.E. 2d 706 (Ill. 1996). The case concerned three parcels of land owned by the Illini Media Company, a non-profit corporation established by the University of Illinois. Pursuant to its corporate purposes, the company operates a campus radio station and publishes the campus newspaper, the university yearbook, and a technical journal. The company's board of directors is composed of university students and faculty members, and its activities are subject to the authority of the university chancellor. Illini Media sought a tax exemption under a state statute exempting property that is used for "college, theological, seminary, university, or other educational purposes . . . ." (35 ILCS 205-19.1, formerly Ill. Rev. Stat. ch. 120, par. 500.1). The State Department of

Revenue denied the tax exemption, but the Illinois appellate court reversed. The court first affirmed that an activity need not be a "school in a traditional sense," nor need it involve classroom instruction, in order to be exempt from property taxation under the statute. The court then declared that the company's general purpose is "educational development," and that educational development is an educational purpose within the meaning of the statute. It was also important to the court that the company's corporate charter stated that the company was engaged in educational purposes, that the company had close ties to the university, that both faculty and students were involved in company management, and that the corporation employed students from the university.

The case also provides a good illustration of how to read a statute broadly or flexibly in order to achieve exempt status.

Sec. 5.6. Community Access to Institutional Property

5.6.4. Soliciting and canvassing. In further proceedings subsequent to the U.S Supreme Court's decision in *Fox* (LHE 3d, p. 662), the U. S. Court of Appeals for the Second Circuit affirmed the trial court's dismissal of the case on mootness grounds (LHE 3d, p. 662 n. 21). *Fox v. Board of Trustees of State Univ. of New York*, 42 F.3d 135 (2d Cir. 1994).

VI

The College
and
the State Government

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Sec. 6.1. General Background

The recent case *of Regents of University of Minnesota v. Chicago and North Western Transportation Co.*, 552 N.W.2d 578 (Minn. App. 1996), illustrates the situation where a university is not successful in a condemnation action (see LHE 3d, p. 673). The Regents challenged the trial court's dismissal of its petition to acquire a thirty-acre tract of land, owned by the defendant railway company, located near the university's East Bank campus. The appellate court affirmed the trial court's ruling that the university had not shown the requisite necessity for taking the property by means of eminent domain. According to the appellate court:

> First, the record indicates that the University has not included this property on its master plan for its anticipated development of the Twin Cities campus. Second, although the University claims to have at least three potential uses for the land, the uses are mutually exclusive, and the Board of Regents has not yet approved a single project for the property. Finally, because of soil contamination problems, it is undisputed that the University could not currently use the property for any of its proposed uses. The parties have not yet agreed on a remediation plan; decontamination of the property will require from approximately two to seven years to complete [552 N.W. 2d at 580].

Thus the university's purposes were speculative, and while the university "may well have the right to purchase this property, . . . it cannot acquire it for speculative future use (stockpiling) by condemnation."

Sec. 6.4. State Regulation of Out-of-State Institutions.

An Oregon case, *City University v. Oregon Office of Educational Policy & Planning*, 870 P. 2d 222 (Or. 1994), affirmed on other grounds, 885 P.2d 701 (Or. 1994), uses the federal constitution's Commerce Clause -- in particular the nondiscrimination principle derived from that Clause (see LHE 3d p. 690) -- to invalidate an Oregon statutory provision. The plaintiff was a regionally accredited private university incorporated in the state of Washington that had a branch campus in Oregon. Oregon law (Ore. Rev. Stat. § 348.835) required degree-granting institutions (including the plaintiff) to submit their degree requirements to the defendant for approval. Section 2 (c) of the statute excepted regionally accredited *Oregon* schools from this requirement (emphasis added). The intermediate appellate court, affirming the trial court, ruled that this provision discriminates on its face against accredited out-of-state schools and thus against interstate commerce. Since the defendant could not justify the distinction between in-state and out-of-state accredited schools, the court held section 2 (c) to be unconstitutional. (On a further appeal, regarding the appropriate remedy, the state conceded the invalidity of section 2 (c) and did not contest the intermediate appellate court's holding of unconstitutionality.)

Sec. 6.5. Other State Regulatory Laws Affecting Postsecondary Education Programs

6.5.2. Open-records laws. State open-records laws are being interpreted to cover a wide array of information that most colleges and universities prefer not to disclose. For example, in *Keddie v. Rutgers, The State University*, 689 A.2d 702 (N.J. 1997), the Supreme Court of New Jersey ruled that bills for the services of outside counsel and documents related to these services are public records, and must be disclosed to the faculty union upon request. And in *State ex rel James v. Ohio State University*, the Supreme Court of Ohio ruled that a professor's tenure file, including letters from evaluators and their identity, is subject to disclosure under that state's Public Records Act. The *James* case is discussed in this Supplement, Section 3.7.1.1.

6.5.5. Workers' compensation laws. The number of cases in which workers' compensation is used by colleges as a defense to tort claims by injured students is on the increase.[1] One potential source of injury--and potential institutional liability--is when students are required to participate in an internship at an off-campus site, supervised by both academic staff and non-employees. For example, in *Hallal v. RDV Sports, Inc.*, 682 So. 2d 1235 (Fla. Ct. App. 1996), a student was injured while he was participating in an internship with the marketing office of the Orlando Magic team. Hallal sued the Magic, and the defendant raised the defense of the exclusiveness of workers' compensation as a remedy for workplace injury. Hallal denied that he was an "employee" for workers' compensation purposes, but the court disagreed. Although Hallal did not receive a salary, he did receive $250 from the Magic. Furthermore, said the court, even if he had not received any monetary compensation, his "participation in the internship program constituted valuable consideration in that such participation was necessary in order for him to satisfy the requirements of his degree" (682 So. 2d at 1237).

The Supreme Court of Massachusetts has rejected a student's claim that her college owed her a duty to ensure her a safe workplace and to ensure that her internship-employer had provided her with workers' compensation insurance coverage. In *Judson v. Essex Agricultural and Technical Institute*, 635 N.E.2d 1172 (Mass. 1994), the college required each student to find employment related to their course of study and to have the employer complete a placement agreement with the college. The agreement provided that the employer would provide workers' compensation insurance coverage for the student, and also stated that the instructor would visit the workplace from time to time. When the plaintiff was injured falling from a barn loft, she was advised by her employer that it had not secured workers' compensation coverage for her. She sued the Institute, claiming that it had a duty to ensure that her employer had secured coverage for her, as well as a duty to provide her with a reasonably safe place to work. The court rejected both of these claims, noting that the placement agreement "merely provided notice to the plaintiff and [the employer] that it was the plaintiff's employer's responsibility to provide such insurance" (635 N.E. 2d at 1175). The court similarly rejected the student's claim that the placement agreement's language concerning the visits of the instructor created a duty to inspect the place of employment for safety hazards.

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[1] Cases and authorities on workers' compensation claims by student athletes are collected in Annot., "Workers' compensation: student athlete as 'employee' of college or university providing scholarship or similar financial assistance," 58 A.L.R. 4th 1259 (1988).

The facts of *Judson* differ from those of *Delbridge* (this Supp., Section 2.3.1) because the instructor was not "teaching" at the worksite, but only visiting the student and her employer. In *Delbridge*, the student was an employee of the company at which the training took place; any litigation against his employer would have been precluded by workers' compensation, which suggests why he chose to sue the college instead.

Students, particularly graduate students, may have a mixed status as students and employees, with important implications for a college's liability under workers' compensation. For example, in *Torres v. State*, 902 P.2d 999 (Mont. 1995), a doctoral student pursuing a degree in chemistry at Montana State University was employed as a teaching and research assistant. Torres claimed that exposure to toxic substances in the chemistry lab had resulted in injuries, and filed a workers' compensation claim. The claim was eventually settled under the state's Occupational Disease Act. Torres then sued the University for compensation for her injuries while she was a student. The Montana Supreme Court affirmed summary judgment for the University, noting that workers' compensation is the exclusive remedy for injuries to employees, and that Torres had already received compensation for her injury. Three judges dissented, believing that because Torres had dual status as an employee and student, her damages could be apportioned between exposure as a student and exposure as an employee.

For an analysis of the criteria that counsel should use when determining whether to assert a workers' compensation defense against a liability claim brought by a student, see Bruce J. Berger and John R. Manthei, "Graduate Students' Injury Claims: Tort Liability or Workers Compensation and the Impact on Insurance Coverage," 26 *College Law Digest* 9 (April 18, 1996).

6.5.6. Laws regulating medical services and medical research. The New York courts have provided another recent example of problems with laws that restrict medical research (see LHE 3d, p. 705). In *T.D. v. New York State Office of Mental Health*, 650 N.Y.S. 2d 173 (App. Div., 1996), a case brought by medical patients incapable of giving their own informed consent, the court invalidated state regulations of human subject research. According to the court, analysis of such regulations -- and human subject research regulations generally -- "necessarily requires a balancing of this State's responsibility to protect individuals who, because of mental illness, age, birth defect, other disease or some combination of these factors, are incapable of speaking for themselves, from needless pain, indignity and abuse, against its worthwhile goal of fostering the development of better methods to diagnose, treat and otherwise care for these same individuals through cooperation with the medical community and private industry" [650 N.Y.S. 2d at 176]. The court held that the state's regulations did not suitably strike this balance, since they did not adequately safeguard the constitutional and common law rights of the patients. In addition, the court held that the New York State Office of Mental Health "lacked the authority to promulgate the challenged regulations governing human subject research, as such authority is given exclusively to the Commissioner of the Department of Health pursuant to Article 24-A of the Public Health Law."

Regarding the constitutional and common law rights of patients, the court reasoned that:

> The provisions concerning the assessment of a potential subject's capacity do not adequately protect the common law privacy and due process rights of potential subjects. The

> regulations do not identify or set out specific or even minimum qualifications for the individual or individuals who initially assess a potential subject's capacity, and do not contain a specific protocol for how the assessment is to be carried out. Further, there are no provisions requiring any notice to the patient that his or her capacity to provide or withhold consent for a particular study is being questioned. Consequently, there is no provision for review of a determination of lack of capacity at the patient's request [650 N.Y.S. 2d at 189].

* * * * *

In another recent case, *Unborn Child Amendment Committee v. Ward*, 943 S.W.2d 591 (Ark. 1997), the Arkansas Supreme Court narrowly interpreted the words "pay for" in a state constitutional amendment banning the use of public money to pay for abortions, thus ruling that the amendment did not prohibit doctors at the University of Arkansas for Medical Sciences (public employees at a public facility) from performing the procedure if it is to be paid for by the patient or by a third party.

VII

The College and the Federal Government

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Sec. 7.1. Federal Constitutional Powers over Education

In two recent cases, the U.S. Supreme Court has reemphasized that the federal government is a government of limited powers (LHE 3d, p. 711) and, in the process, has created new protections against federal authority for the states and state agencies. In the first case, *Printz v. United States*, 117 S.Ct. 2365 (1997), the Court relied on a principle of state sovereignty. The question was whether Congress could compel state officers (in this case sheriffs) "to execute Federal Laws." The Court answered this question in the negative, thus invalidating provisions of the Brady Handgun Violence Prevention Act that commanded state and local law enforcement officers to conduct background checks on prospective handgun purchasers. According to the Court, these provisions of the Brady law violated state sovereignty protections: "[I]t is the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty . . . . It is the very *principle* of separate state sovereignty that such a law offends . . . ." Tying its holding in *Printz* to an earlier holding in the case of *New York v. United States*, 505 U.S. 144 (1992), the Court concluded:

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a Federal regulatory program [117 S.Ct. at 2384].

In the second new case, *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996) (discussed further in this Supp., Section 7.2.10.1), the Court overruled *Pennsylvania v. Union Gas* (LHE 3d, p. 712). By a 5-4 vote, the Court declared that "[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area [e.g., interstate commerce], the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." The Court also acknowledged, however, that this principle does not apply to Congress' power to enforce the Fourteenth Amendment because -- according to earlier cases other than *Union Gas* -- that amendment permits Congress to authorize private suits against unconsenting states that have allegedly violated the amendment. (See

Fitzpatrick v. Bitzer, LHE 3d, Section 7.1.4, and *Atascadero State Hospital v. Scanlon*, LHE 3d, Section 7.5.9.) The dissenters in *Seminole Tribe* complained that the majority's decision "prevents Congress from providing a federal [judicial] forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy."

Printz and *Seminole Tribe* should also be compared with a third recent Supreme Court case, *United States v. Lopez*, discussed in this Supplement, Section 7.1.3, which also limits Congressional powers not only over the states but, more particularly, over private individuals and institutions.

7.1.3. Commerce power. In the 1990's, the U.S. Supreme Court has made another attempt -- analytically distinct from the *National League* line of cases in the 1970's and 1980's -- to limit Congress' commerce power. The pertinent case is *United States v. Lopez*, 115 S. Ct. 1624 (1995), in which the Court invalidated a federal statute making it a crime to possess a firearm on or within 1000 feet of school grounds. The statute exceeded the scope of the commerce power because Congress had not required prosecutors to prove that the defendant's actions had some "nexus" to interstate commerce, nor had Congress made findings or produced evidence that gun possession on or near school grounds "substantially affects" interstate commerce. Regarding the second basis for invoking the commerce power, the Court emphasized that "education" is an area "where States historically have been sovereign."

thus making it especially important that Congress develop findings or evidence to justify federal involvement under the commerce power. The commerce power does not extend to the regulation of all "activities that adversely affect the learning environment," and the Court will not presume (absent Congressional findings or evidence) that all such activities also adversely affect interstate commerce:

> We do not doubt that Congress has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process. That authority, though broad, does not include the authority to regulate each and every aspect of local schools [115 S. Ct. at 1633].

7.1.4. Civil rights enforcement powers. In the recent case of *City of Boerne v. Flores* (this Supp., Section 1.6), the U.S. Supreme Court clarified the limits on Congress' powers under Section 5 of the Fourteenth Amendment and thus alleviated some of the uncertainty regarding the scope of the enforcement powers. In particular, the Court emphasized that:

> Congress' power under §5 . . . extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial," *South Carolina v. Katzenbach*, [383 U.S.] at 326. The design of the Amendment and the text of §5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause.

> Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]" [117 S.Ct. at 2164].

Sec. 7.2. Federal Regulation of Postsecondary Education

7.2.1. Overview. Congress has passed several laws since the publication of LHE 3d that affect colleges and universities. For example, the Lobbying Disclosure Act of 1995 (Pub. L. No. 104-65, 109 Stat. 691 (1995), codified at 2 U.S.C. §§ 1601 et seq.), which took effect January 1, 1996, requires the disclosure of efforts by paid lobbyists to affect decisions by the executive and legislative branches of the federal government. An organization that spends at least $20,000 every six months and has at least one employee who spends more than twenty percent of his or her time in lobbying activities as defined in the Act must be listed on a registration form; reports must be filed with Congress every six months.

The Communications Act of 1934 was amended by the Telecommunications Act of 1996 (Pub. L. No. 104-104, 110 Stat. 56); see generally Kenneth Salamon, Todd Gray, and Leonard Kennedy, "Implications of the Telecommunications Act of 1996 for Schools, Colleges, and Universities," 109 *West Education Law Rptr.* 1051 (1996). This lengthy and complex Act was designed to "encourage the rapid deployment of new telecommunications technologies" and promote market competition in telecommunications for the benefit of consumers (110 Stat. 56). One of the seven titles of the Telecommunications Act (Title V) is styled as The Communications Decency Act of 1996, which is discussed in Section 7.2.18 of this Supplement. Another title of this Act has implications for colleges and universities that provide telephone service in student housing. The law includes provisions that attempt to ensure access to telecommunications for consumers across the nation (see 47 U.S.C. §§ 214(e), 254); rates for multi-line users, such as colleges and universities, may rise. Administrators should consult with legal experts to ascertain the implications of this law for their intra-campus telephone service.

The Volunteer Protection Act of 1997 (Pub. L. No. 105-19, 111 Stat. 218 (1997)) bars claims against volunteers who have acted within the scope of their duty. There are exceptions for harm from motor vehicle accidents and gross misconduct. The law does not bar claims against nonprofit organizations, but only against individuals who are volunteers.

Two other federal laws involve liability for acts of violence, and both are relevant to colleges. The "Drug-Induced Rape Prevention and Punishment Act of 1996," Pub. L. No. 104-305, 110 Stat. 3807 (October 13, 1996) amends section 401(b) of the Controlled Substances Act to provide that distributing a controlled substance (specifically, flunitrazepam) to an individual without that individual's knowledge, with the intent to commit a crime of violence, including sexual assaults, is made a criminal act subject to imprisonment. The intent of the law is to criminalize the use of controlled substances used as a precursor to date rape.

The Violence Against Women Act (Pub.L. No. 103-322, 108 Stat. 1941 (September 13, 1994), provides a cause of action, the right to compensatory and punitive damages, and injunctive and declaratory relief, against an individual who commits a crime of violence motivated by the victim's gender. The violence need not have resulted in criminal charges. Two federal courts have addressed the constitutionality of this law; a Connecticut district court upheld it in *Doe v. Doe*, 929 F. Supp. 608 (D. Conn. 1996), while a Virginia district court invalidated it as an inappropriate use of congressional power under the commerce clause (*Brzonkala v. Virginia Polytechnic and State Uni*versity, 935 F. Supp. 779 (W.D. Va. 1996).

In addition to these recent federal laws, there have also been numerous new developments regarding the Medicare program (LHE 3d, pp. 715-716). These are discussed in a new section (7.2.19) below in this Supplement.

7.2.4. Fair Labor Standards Act. The U.S. Supreme Court issued an opinion that has significance for both public and private colleges. In *Auer v. Robbins*, 117 S. Ct. 905 (1997), the Court addressed the claim of several police officers that they were owed overtime pay. The employer argued that the officers were exempt from overtime pay requirements in the FLSA, in part because they were paid a salary. Under regulations implementing the FLSA, 29 C.F.R. secs. 541.1(f), 541.2(e), and 541.3(e) (1996), an employee is considered to be salaried if

> he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed [29 C.F.R. sec. 541.118(a)].

Because one police officer had been disciplined for violating a regulation by having his salary reduced, the other police officers claimed that the "salary basis" test did not apply to them and they were eligible for overtime pay.

The regulations provide that employers who have imposed pay deductions on salaried employees may reimburse those employees and promise to comply with the regulation in the future, as long as the deductions were made inadvertently or for reasons other than lack of work (29 C.F.R. sec. 541.118(a)(6)). In a unanimous opinion authored by Justice Scalia, the Court upheld the regulations as reasonable and their application to public sector employees as appropriate. Of interest to colleges and universities is the portion of the opinion that discusses the implications of an employer practice or policy of making deductions from the pay of salaried employees for disciplinary reasons. If such a practice or policy exists, this may result in making all the employees subject to the policy qualified for overtime pay under the FLSA, as well as liquidated damages.

* * * * *

An Alabama appellate court has ruled that residence hall counselors are eligible to receive overtime pay because none of the exemptions in the

FLSA apply to them. In *Alabama Agricultural and Mechanical University v. King*, 643 So. 2d 1366 (Ala. Civ. App. 1994), the university had argued that its residence hall counselors were "administrative employees" and thus exempt from the Act's overtime provisions. That exemption applies to employees whose primary duties consist of performing work "directly related to management policies or general business operations" of the employer, and whose work requires the exercise of discretion and independent judgment. The court did not view the counselors' responsibilities as "administrative," explaining that they were required to inspect the residence halls for repairs, inspect student rooms for cleanliness, maintain security, and request that repairs be made.

The jury had found that the counselors understood that their compensation was to be for 40 hours of work per week, but the counselors had established that they worked 60 hours per week. The court upheld the jury's finding, pointing to language in the university's Handbook for Residence Hall Counselors that stated that the work obligation for counselors was 40 hours per week, as well as testimony by counselors of their understanding of their work obligation.

* * * * *

The U.S. Court of Appeals for the Second Circuit has rejected the claim of a prison inmate who tutors student-prisoners that he is an "employee" of the college that provides the college program at the prison. The Consortium of the Niagara Frontier, a group that includes three colleges, offers inmates at Attica Correctional Facility the opportunity to earn a college degree while they are incarcerated. The Consortium provides the course instructors, and some inmates assist with administration of the program and tutor other student-inmates. The plaintiff, a prison inmate at Attica, was hired by the Consortium to be a "clerk-tutor" at the rate of $.95 to $1.45 per day, a rate of pay consistent with the inmate wage system at Attica.

After working in that capacity for six months, the plaintiff filed a claim under the Fair Labor Standards Act, asserting that the Consortium was his "employer" and as their "employee," he was entitled to receive the minimum wage for all hours that he worked. The trial court found that plaintiff Danneskjold was not an employee of the Consortium and granted summary judgment to the Consortium, and the appellate court affirmed. In *Danneskjold v. Hausrath*, 82 F.3d 37 (2d Cir. 1996), the court noted that not all prison work is exempt from the FLSA: an "economic reality" test is required to determine whether the law should be applied. The court identified four reasons why "forced" prison labor is not subject to the FLSA: prisoners are not in the national economy (the FLSA requires employers to be involved in interstate commerce); prison work is often designed to train or rehabilitate prisoners; prisoners' living standards are determined by what the prison provides (thus not requiring a "minimum wage" in order to ensure a minimum standard of living); and most prison labor does not complete with private employers. Even if the labor is voluntary rather than forced, said the court, it still does not implicate the FLSA if the volunteer is providing goods or services for the prison itself, rather than for the outside economy.

The outcome of this case is important because the U.S. Supreme Court has previously ruled, in *Alamo Foundation v. Secretary of Labor* (LHE 3d, p. 722) that "volunteer" sales staff for a religious organization that sold books were subject to the FLSA and were entitled to the minimum wage. In the present case, the court refused to find that the inmates were engaged in "commerce," thus exempting them from the minimum wage protections of the FLSA, even if they are acting as volunteers.

7.2.6. Employment discrimination laws. Congress again amended the Veterans Readjustment Assistance Act in 1994. As amended, this law -- now titled in the codification as "Employment and Reemployment Rights of Members of the Uniformed Services" (38 U.S.C. § 4301 et seq.), now limits the reinstatement protections to those veterans absent from their jobs for five years or less (38 U.S.C. sec. 4312, added by P.L. 103-353, 108 Stat. 3153, October 13, 1994).

7.2.6.2. Applicability to religious institutions. The "ministerial exception" (LHE 3d, pp. 730-732) was applied in *EEOC v. Catholic University*, 83 F.3d 455 (D.C. Cir. 1996), to a Catholic nun's challenge of a negative tenure decision at Catholic University. Sister Elizabeth McDonough, a nun of the Dominican Order, was hired as an assistant professor in the Department of Canon Law at Catholic University. Sister McDonough was the first woman to hold a tenure-track position in the department. She was promoted to associate professor five years later, and shortly afterward submitted an application to be reviewed for tenure.

Tenure applicants must receive a favorable vote from each of three bodies in order to secure tenure: their department's tenured faculty, the School of Religious Studies' Committee on Appointments and Promotions (CAP), and the Academic Senate Committee on Appointments and Promotions. For tenure decisions in the Canon Law department, ecclesiastical authorities must also approve the appointment, according to the University's Canonical Statutes.

The tenured faculty in the Canon Law department voted not to recommend tenure by a split vote of two in favor, three opposed, and one abstention. Sister McDonough appealed this vote to the CAP, which returned the decision to the department in light of the fact that Sister McDonough had published an additional article since the department's vote. A second vote failed to result in a majority in favor of tenure. Sister McDonough withdrew her tenure application and re-submitted it six months later; the department again failed to provide a positive recommendation. The application then went to the School CAP, which supported her application. The Senate CAP, however, voted three in favor, one opposed, and two abstentions, thus denying the "absolute majority" required for a positive recommendation. The academic vice president asked the Senate CAP to reconsider; their second vote was unanimously against tenure on the grounds that the candidate's teaching and scholarship were "marginal."

Sister McDonough, joined by the EEOC, filed a sex discrimination claim against the university. Although a one-week trial was held, the trial judge did not rule on the merits, determining that both the free exercise and the establishment clauses of the First Amendment would be violated by judicial review of the tenure decision because Sister McDonough's role in the Department of Canon Law was the "functional equivalent of the task of a minister" (856 F. Supp. 1 (D.D.C. 1994)). He also stated that judicial review would entangle both the EEOC and the court with religion, a violation of the Establishment Clause. This appeal ensued.

In affirming, the D.C. Court of Appeals first addressed the free exercise clause issue. Sister McDonough had argued that the "ministerial" exception for federal laws should not be applied to her because she was neither an ordained priest, nor did she perform religious duties. The appellate court responded that ordination was irrelevant; the ministerial exception has been applied to individuals who perform religious duties, whether or not they have been ordained. To her second argument, the court replied that her duties were, indeed, religious because the department's mission was to instruct students in "the fundamental body of ecclesiastical laws" and, as the only department in the United States empowered by the Vatican to confer ecclesiastical degrees in canon law, the mission of its faculty, including the plaintiff, was "to foster and teach sacred doctrine and the disciplines related to it" (quoting from the University's Canonical Statutes). Furthermore, said the court, it was irrelevant that the tenure denial had not been on religious grounds. The act of reviewing the employment decision of a religious body concerning someone with "ministerial" duties was offensive to the Constitution, regardless of the basis for the decision.

* * * * *

A federal trial court has applied Title VII's religious exemption (LHE 3d, p. 727) to dismiss a religious discrimination claim against Samford University, and the appellate court has affirmed. In *Killinger v. Samford University*, 917 F. Supp. 773 (N.D. Ala. 1996), *affirmed*, 113 F.3d 196 (11th Cir. 1997), the plaintiff was a faculty member at the university. Samford is a private institution affiliated with the Baptist faith. Killinger alleged that administrators at Samford would not permit him to teach certain religion courses at its Beeson Divinity School because of the theological and philosophical positions that Killinger had taken. Characterizing this denial as religious discrimination, Killinger sued the university under Title VII of the Civil Rights Act of 1964 (LHE 3d, Section 3.3.2.1). The university asserted the exemption in Title VII for religious educational institutions. The court determined that the university was controlled by the Baptists, since all of its trustees were required to be practicing Baptists and its students were required to attend religious convocations. University publications emphasized the religious nature of the education provided. Therefore, ruled the court, the university was a religious, rather than a secular institution.

The appellate court agreed with the district court in all respects. Samford was a religious, rather than secular institution, said the appellate court, because it received the largest proportion of its funding (7 percent) from the Baptist State Convention, it required all faculty to subscribe to the Baptist Statement of Faith and Message, and its mission is to "foster Christianity . . ." Furthermore, both the Internal Revenue Service and the U.S. Department of Education recognize Samford as a religious institution.

Furthermore, said the court, Title VII's exemption is for an institution"in whole or substantial part, owned, supported, controlled or managed by a particular religion or religious corporation . . ." The substantial contribution from the Baptist Convention to Samford meant that the college was in part *supported* by a religious corporation, which was sufficient to trigger the exemption, according to the court.

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For an analysis of the *Kamehameha Schools* decision (LHE 3d, p. 728), see Jon M. VanDyke, "The Kamehameha Schools/Bishop Estate and the Constitution," 17 *U. Haw. L. Rev.* 413 (1995).

7.2.7. Immigration laws. Congress has passed another immigration statute, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. No.104-208, 110 Stat. 3009 et seq. Section 641 of this Act, codified at 8 U.S.C. § 1372, has particular importance for higher educational institutions. That section requires "approved" institutions and "designated" exchange visitor programs to collect information on nonimmigrant foreign students and exchange program participants, and transmit it to the U.S. Attorney General. The listing of information to be submitted includes "the academic status of the alien" and "any disciplinary action taken . . . against the alien as a result of the alien's being convicted of a crime . . ." (§641(c)(1), 8 U.S.C. §1372(c)(1)). The Attorney General has authority to exempt this information collection from the requirements of FERPA (see LHE 3d, Section 4.16.1) as needed to carry out the program (§641(c)(2), 8 U.S.C.

§1372(c)(2)). Institutions and exchange visitor programs must also collect fees from aliens covered by the information requirements and remit the fees to the Attorney General (§641(e), 8 U.S.C. §1372(e)). The Attorney General must designate the countries whose nationals are to be covered by the information and fee requirements, and all countries must be covered by the year 2003 (§641(b) & (g), 8 U.S.C. §1372(b) & (g)). The fee collection requirements became effective on April 1, 1997 (§641(e)(1), 8 U.S.C. §1372(e)(1)), and the information collection requirement becomes effective on January 1, 1998 (§641(a)(2), 8 U.S.C. §1372(a)(2)).

7.2.8. Laws governing research on human subjects. Although the Federal Policy for the Protection of Human Subjects has not been adopted in total by executive-branch agencies other than those listed on p. 741 of LHE 3d, portions of the Policy have been extended to classified research funded by other agencies. On March 27, 1997, President Clinton issued a memorandum entitled "Strengthened Protections for Human Subjects of Classified Research" that was addressed to nineteen federal cabinet secretaries and the directors of certain federal commissions (62 Fed. Reg. 26369). The memorandum requires institutional review boards for secret projects, requires those IRBs to have at least one nongovernmental member, and details several modifications to the Federal Policy that provide additional protections for the subjects of classified research. The agency or commission sponsoring the research must promulgate a final rule implementing the Federal Policy for the Protection of Human Subjects and the President's modifications.

* * * * *

The Nuclear Regulatory Commission has promulgated a final rule governing the medical use of radioactive material. Entities that conduct research using radioactive material or that use such material for medical purposes must obtain informed consent of the subjects and prior review and approval by an institutional review board as defined by and required in the Federal Policy for the Protection of Human Subjects (59 Fed. Reg. 61767 (December 2, 1994)).

7.2.10. Copyright laws.

7.2.10.1. Overview. In 1990 Congress passed the Copyright Remedy Clarification Act (Pub. L. No. 101-553, 104 Stat. 2749), which allows copyright holders to collect damages from public colleges and universities. Prior to this Act, several federal appellate courts had ruled that the Eleventh Amendment prohibited the application of the Copyright Act's damages provisions to state agencies. The enforceability of this law is now unclear, however, because the U.S. Supreme Court ruled in *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996) (discussed in Section 7.1 of this Supplement), that state agencies in those states which had not waived sovereign immunity against federal court litigation could not be sued by private parties. Since federal copyright law is the exclusive remedy for copyright violations, *Seminole* suggests that public colleges and universities that are protected by the sovereign immunity doctrine (see LHE 3d, Section

2.3.3) may be immune from this litigation. Administrators should consult counsel for further developments in this regard.

7.2.10.2. The fair use doctrine. The result in *American Geophysical Union v. Texaco* (LHE 3d, p. 751) has been affirmed at 60 F.3d 913 (2d Cir. 1994). Although the court, in a subsequent opinion (1994 U.S. App. LEXIS 36735 (2d Cir., Dec. 23, 1994)), amended its earlier opinion to distinguish between institutional researchers, such as Texaco, and individual scientists or professors, some copyright experts believe that the opinion may require universities to enter licensing agreements with publishers to avoid violations of the fair use doctrine. (Goldie Blumenstyk, "Court's Revisions in Copyright Case Add to Confusion for Scholars," *The Chronicle of Higher Education*, August 11, 1995 at A14.

* * * * *

An en banc federal appellate court has provided an important analysis of the fair use doctrine in the context of copying materials for professors' "coursepacks" that are used in instruction. In *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir. 1996), the en banc court, in an 8-5 opinion, reversed an appellate panel's finding that the copying at issue constituted fair use. Michigan Document Services (MDS) is a commercial copying service that reproduces copyrighted publications, binds them into "coursepacks," and sells the coursepacks to students at the University of Michigan. Although other copy shops near the University had paid copyright fees and royalties, MDS did not, and stated this policy in its advertising. Despite the earlier holding in *Basic Books v. Kinko's Graphics*

Corp., (LHE 3d, p. 750), the owner of MDS had been advised by his attorney that the opinion was "flawed;" he believed that production of coursepacks was protected under the fair use doctrine. Although the trial court found that the copying was not protected under the fair use doctrine, an appellate panel reversed; the en banc court sided with the trial court in most respects.

The en banc court analyzed the copying under the four elements of fair use (LHE 3d, p. 749). The court found that, because MDS profited from the sale of coursepacks, the purpose of the copying was commercial; furthermore, the loss of copyright permission fees diminished the copyright value of the books that had been copied. In response to the defendant's argument that the court should look only at the effect on actual sales of the books, rather than the diminution of revenue from copyright fees (the fourth test), the court stated that there was a strong market for copyright fees, and that the reduction in such fees should be considered in an analysis of the market impact of the alleged infringement.

With respect to the remaining tests, the court ruled that the copied material was creative and not publicly available and that the excerpts were lengthy (8,000 words and longer). Congress had established a 1,000 word "safe harbor" in the *Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals* (reprinted in H.R. Rep. No. 1476 at 68-71, 94th Cong., 2d Sess.(1976)).

The trial court had ruled that MDS's behavior had been a willful violation of the Copyright Act, and thus supported enhanced damages. On the contrary, the en banc court stated that the fair use doctrine was "one of the most unsettled areas of the law," and thus the defendant's belief that his interpretation of the fair use doctrine was correct was not so unreasonable that the violation could be termed willful.

Five judges joined a dissenting opinion that noted that the fair use doctrine permits the making of "multiple copies for classroom use," which these judges believed applied to the copying by MDS. Characterizing the majority's opinion as a narrow reading of the fair use doctrine, they predicted that costs would increase and student access to publications would be limited as a result of this ruling. The U.S. Supreme Court denied review (117 S. Ct. 1336 (1997)).

* * * * *

Guidelines for the "fair use" of copyrighted material used to create CD-ROMS and other multimedia projects have been approved by a group called the Conference on Fair Use, a committee of the Consortium of College and University Media Centers. The guidelines limit the amount of a work of music or other copyrighted material that can be used in multimedia projects created by professors and students. The guidelines do permit the resulting works to be used for distance learning, as long as their access is limited to enrolled students. Goldie Blumenstyk, "Educators and Publishers Reach Agreement on 'Fair Use' Guidelines for CD-ROMS," *The Chronicle of Higher Education*, October 25, 1996 at A28. The Guidelines are available on the World Wide Web at:

http://www.lib.virginia.edu/dmmc/Copyright/fairuse.html.

7.2.10.7. Copyright and standardized tests. In *College Entrance Examination Board v. Pataki*, 889 F. Supp. 554 (N.D.N.Y. 1995), the Board argued that the New York Standardized Testing Act was preempted by the Copyright Act, and the court ruled that the Board had established a prima facie case of copyright infringement sufficient to support the entry of a preliminary injunction.

7.2.12. Trademark laws. The case of *University of Pittsburgh v. Champion Products, Inc*, (LHE 3d, p. 760) was settled, and the judgment was vacated as part of the settlement (J. McCarthy, *Trademarks and Unfair Competition* sec. 3.02(1) (2d ed. 1984). It has also been superseded by amendments to federal trademark law contained in the Trademark Law Revision Act of 1988 (LHE 3d, p. 760). In *University Book Store v. Board of Regents of the University of Wisconsin System*, 1994 TTAB LEXIS 8 (Trademark Trial and Appeal Board, 1994), the Board explained that the amendments have changed the definition of "abandonment" of a trademark to state that abandonment only occurs when a mark loses its significance as a mark. The practical result of this amendment is to remove the requirement that some courts had imposed (as had the court in the *Pittsburgh* case) on applicants who seek to register a trademark that they prove that they acted to oppose unauthorized use of the mark as soon as they were aware of that unauthorized use. The Board in the *University of Wisconsin* case was sharply critical of the trial court's decision on remand in the *Pittsburgh* case, discussed in LHE 3d on p. 760. (The correct citation for the *Pittsburgh* case is *University of Pittsburgh* *v. Champion Products, Inc.*, 686 F.2d 1040 (3d Cir. 1982), *on remand*, 566 F. Supp. 711 (W.D. Pa. 1983)). In the *Wisconsin* case, the Board stated that, in addition to the fact that the *Pittsburgh* case was decided prior to the 1988 amendments, its result was "outmoded and not in accordance with more recent cases . . . which recognize and accept the commercial reality of the now common practice of licensing of collegiate marks" (1994 TTAB LEXIS at *32). As a result of this and similar cases (see, for example, *Board of Trustees of the University of Arkansas v. Professional Therapy Services*, 873 F. Supp. 1280 (W.D. Ark. 1995), as well as the 1988 amendments, colleges are meeting with greater success in protecting their names, insignia, and other marks.

* * * * *

The University of Florida was unsuccessful in its copyright and trademark claims against a company that provides "class notes" for University students. A-Plus Notes, a private corporation, hires students to attend lectures and take notes, and then markets those notes to students at the University of Florida. The University filed a lawsuit against A-Plus notes, asserting that the content of its professors' lectures was protected by statutory and common law copyright with respect to both the written and oral content of the professors' lectures. Secondly, the University claimed that A-Plus's use of the University's course numbering system to market its "study guides" violated the Lanham Act (LHE 3d, p. 760) because its actions constituted false representation of the origin of the information and deceptive advertising. The trial court awarded summary judgment to A-Plus on the Lanham Act claim, and denied the University's motion for summary judgment on the copyright claims. At trial, a jury found that the lecture content was not protected by either statutory or common law copyright law. The University appealed both the jury verdict and the trial court's grant of summary judgment on the trademark claim.

In *University of Florida v. KPB, Inc.*, 89 F.3d 773 (11th Cir. 1996), the court examined the various types of unfair competition that the Lanham Act forbids. The law prohibits unfair trade practices that make false representations as to the origins or descriptions of certain products. In this case, the University was asserting that A-Plus's use of the University's course numbering system was deceptive and confused the purchasers as to the origin of the materials (in other words, the purchasers might believe that the "study guides" were produced by the University rather than by A-Plus). The University characterized its course numbering system as a service mark, which is a word or symbol used by a person (here, the University) to identify and distinguish a service that it provides (here, college courses). In order to satisfy the elements of a Lanham Act claim, said the court, the University had to prove that its service mark was distinctive, that it was primarily non-functional, and that the defendant's service mark was confusingly similar. Since the "marks" that the University was attempting to protect were numbers, locations of classes, and the time the class met, the court determined that this information was functional. Since the University could not establish all three elements of the claim, the court affirmed the summary judgment award of the trial court.

With respect to the copyright claims, the issue on appeal was the sufficiency of the evidence to support the jury's verdict. The court made short work of this issue, stating that the record showed sufficient evidence to support the jury's verdict.

7.2.18. [new section] Regulation of computer network communications.

Under the Communications Act of 1934 (see LHE 3d, Section 7.2.1), as recently amended by the Telecommunications Act of 1996 (110 Stat. 56), the federal government is the primary regulator of radio, television, and telephone communications. As new communication technologies have evolved, the federal government has also included them within its regulatory reach. The newest focus of regulatory activity, and legal and policy concerns, is computer technology and the Internet.

7.2.18.1. Computer statutes. The first major federal legislation regarding computers was passed in 1986. In that year Congress passed the Computer Fraud and Abuse Act of 1986 (18 U.S.C. § 1030 *et seq.*) and the Electronic Communications Privacy Act of 1986 (18 U.S. C. § 2510 *et seq.* and § 2701 *et seq.*). The former act prohibits the intentional and knowing accessing of a "federal interest computer" without prior government authorization. The latter act creates limited privacy rights for computer users by prohibiting the *interception* of private computer communications and the *disclosure* of intercepted communications. This prohibition applies to colleges and universities as systems operators as well as to individual faculty.

students, and staff members. There are various important exceptions, however, that permit system operators to intercept or disclose in certain circumstances (18 U.S.C. § 2511). Under section 2511(2)(a)(I), for instance, the operator may intercept when it is necessary to view the content in order to forward the message; and under section 2511(3)(b)(IV), the operator may disclose a message to law enforcement officials if it appears related to the commission of a crime.

Most recently, Congress passed the Communications Decency Act of 1996 (CDA) (110 Stat. 56, 133-135, 47 U.S.C. § 223 (a) to (h)), enacted as Title V of the Telecommunications Act of 1996. The CDA regulates the content of computer communications. Section 223(a) (47 U.S.C. § 223(a)) -- called the "indecency" provision -- applies criminal penalties to anyone who:

> 1) in interstate or foreign communications . . .
>
> (B) by means of a telecommunications device ***knowingly*** --
>
> (I) makes, creates, or solicits, and
>
> (ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other ***communication which is obscene or indecent***, knowing that the recipient of the communication is ***under 18 years of age***, regardless of whether the maker of such communication placed the call or initiated the communication;
>
> . . . or
>
> 2) ***knowingly permits*** any telecommunications facility ***under his control*** to be used for any activity prohibited by paragraph (1) with the ***intent*** that it be used for such activity (emphasis added).

Section 223(d) -- called the "patently offensive" provision -- applies criminal penalties to anyone who:

> (1) in interstate or foreign communications knowingly --
> (A) uses an interactive computer service to send to a specific person or persons ***under 18 years of age***, or
> (B) uses any interactive computer service to display ***in a manner available to a person under 18 years of age***,
> (1) any comment, request, suggestion, proposal, image or other ***communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs,*** regardless of whether the user of such service placed the call or initiated the communication; or
> (2) ***knowingly permits*** any telecommunications facility ***under such person's control*** to be used for an activity prohibited by paragraph (1) with the ***intent*** that it be used for such activity . . . (emphasis added).

These provisions were challenged in court as soon as the President had signed the Act, and the ensuing court decisions provide the best guidance to date on how the First Amendment will apply to, and limit, Congress' authority to regulate the content of computer communications.

In *American Civil Liberties Union v. Reno*, 929 F.Supp. 824 (E. D. Pa. 1996), *affirmed*, 117 S. Ct. 2329 (1997), a three-judge panel of the United States District Court for the Eastern District of Pennsylvania granted a preliminary injunction against enforcement of both § 223(a) and § 223(d) of the Communications Decency Act. The plaintiffs had claimed that both sec.

223(a) and sec. 223(d) violated the free speech and press clauses of the First Amendment as well as the Fifth Amendment due process clause. Although the court's decision was unanimous, each of the judges wrote a separate opinion. Chief Judge Sloviter determined that Sections 223(a) and (d) were government-imposed, content-based restrictions on speech that failed to meet standards of strict scrutiny. Judge Buckwalter determined that these provisions were both unconstitutionally overbroad and unconstitutionally vague. And Judge Dalzell determined that, although the provisions were not unconstitutionally vague in his view, they were overbroad content-based restrictions and unconstitutional for that reason.

Specifically, Chief Judge Sloviter held that the CDA is subject to review under a strict scrutiny standard because it is a "government-imposed content-based restriction on speech and the speech at issue is entitled to constitutional protection." Under the strict scrutiny standard, a regulation of speech will be upheld only if the Government can show that it furthers a compelling governmental interest by the least restrictive means possible. If the government's means of regulation "sweep[s] more broadly than necessary and thereby chills the expression of adults," the regulation will violate the First Amendment even if the interest being furthered is compelling. The Chief Judge agreed that "It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling," and "this interest extends to shielding minors from the influence of literature that is not obscene by adult standards." But she did not agree that the CDA furthers this interest in the least restrictive (or the narrowest) way. It is "either technologically impossible or economically prohibitive for many of the plaintiffs to comply with the CDA without seriously impeding their posting of online material which adults have a constitutional right to access." Thus, Sloviter stated, "I conclude inexorably from the foregoing that the CDA reaches speech subject to the full protection of the First Amendment at least for adults. . . . There is no effective way for many Internet content providers to limit the effective reach of the CDA to adults because there is no realistic way for many providers to ascertain the age of those accessing their materials."

Judge Buckwalter based his decision on the fact that the "statute is overbroad and does not meet the strict scrutiny standard." In addition, he asserted that the word *indecent* in Section 223(a) is unconstitutionally vague, and that the terms *in context* and *patently offensive* in Section 223(d) also are unconstitutionally vague. He did note, however, that it is too early in the development of this new medium to conclude that other attempts to regulate protected speech within this medium will also fail.

In supporting his conclusions, Judge Buckwalter reasoned that "the CDA does not define the term 'indecent', and the FCC has not promulgated regulations defining indecency in the medium of cyberspace. . . . Indecent in this statute is an undefined word which, standing alone, offers no guidelines whatsoever as to its parameters." He emphasized that, "[i]n statutes that break into relatively new areas the need for definition is greater, because even commonly understood terms may have different connotations or parameters in this new context." Moreover,

> the unique nature of the medium cannot be overemphasized in discussing and determining the vagueness issue. This is not to suggest that new technology should drive constitutional law. To the contrary, I remain of the belief that our fundamental constitutional principles can accommodate any technological achievements, even those which, presently, seem to many to be in the nature of a miracle such as the Internet [929 F. Supp. at 865 note 9].

The third member of the three-judge panel, Judge Dalzell, emphasized that this case is not about obscenity or child pornography, which the government could completely ban from the Internet, but rather "is about 'indecency' as that word has come to be understood" in the U.S. Supreme Court's First Amendment jurisprudence. The CDA's regulation of indecent speech, being a content-based regulation, is subject to strict scrutiny. Although Dalzell did not agree that the provisions are unconstitutionally vague, he did agree with Judge Buckwalter that they are overbroad. The provisions are not vague, in Judge Dalzell's view, because Congress intended that the phrase "indecent" in Section 223(a) would be defined with reference to the "longer description" of patently offensive speech in Section 223(d), which is a definition consistent with earlier Supreme Court cases.

To analyze the overbreadth of the CDA provisions, Judge Dalzell engaged in what he called a "medium specific approach to mass communication." A medium specific analysis allows the court to determine the "proper fit" between First Amendment concerns and other competing interests by considering the special qualities of the computer network medium. Relying on the court's extensive findings of fact [929 F. Supp. at 830-849], he concluded not only that the CDA is unconstitutional but also that:

> [F]rom the Supreme Court's many decisions regulating the different media differently, I conclude that we cannot simply assume that the Government has the power to regulate protected speech over the Internet, devoting our attention solely to the issue of whether the CDA is a constitutional exercise of that power. Rather, we must also decide the validity of the underlying assumption as well, to wit, whether the Government has the power to regulate protected speech at all. That decision must take into account the underlying technology, and the actual and potential reach, of that medium [929 F. Supp. at 877].

In concluding that "Congress may not regulate indecency on the Internet at all," Judge Dalzell cited four specific characteristics of the Internet:

> Four related characteristics of Internet communication have a transcendent importance to our shared holding that the CDA is unconstitutional on its face. . . . First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers [929 F. Supp. at 877].

Thus,

> [t]he Internet may be fairly regarded as a never-ending worldwide conversation. The Government may not, through the CDA, interrupt that conversation. As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion. It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory market place of mass speech that this country -- and indeed the world -- has yet seen [929 F. Supp. at 883].

Under the CDA, according to Judge Dalzell, the "speech enhancing" benefits that have resulted from the utilization and development of the Internet would be undermined; barriers to entry for speakers subject to the CDA would skyrocket; the diversity of the content would diminish; and the relative parity among speakers that now exists would be altered. Moreover, although the government has a compelling interest in protecting children from pornography, the government can do so through enforcement of already existing laws that criminalize obscenity and child pornography.

Based on the careful individual analyses of the three judges, the court granted the plaintiffs' motion for a preliminary injunction and enjoined the Government from "enforcing, prosecuting, investigating or reviewing any matter premised upon" Sections 223(a)(1)(B) and 223(a)(2) of the CDA "to the extent that such enforcement, prosecution, investigation, or review are based upon allegations other than obscenity or child pornography . . . ."[1]

On direct appeal, the United States Supreme Court affirmed the decision of the 3-judge district court: "Notwithstanding the legitimacy and importance of the Congressional goal of protecting children from harmful materials, we agree with the three-judge district court that the statute abridges 'the freedom of the press' protected by the First Amendment." (*Reno v. ACLU*, 117 S. Ct. 2329 (1997)). Seven of the nine justices agreed that the CDA was unconstitutional on its face, and the other two justices agreed that it was unconstitutional in most of its applications. Justice Stevens wrote the majority opinion for the seven justices, and Justice O'Connor wrote a concurring and dissenting opinion for the other two.

The Court's majority opinion relied primarily on the First Amendment overbreadth arguments and did not directly rule on the Fifth Amendment vagueness issues. The Court did, however, "discuss the vagueness of the CDA because of its relevance to the First Amendment overbreadth inquiry...." Reasoning that the challenged provisions of the CDA were content-based restrictions on speech that, due to their overbreadth, create "an unacceptably heavy burden on protected speech," the Court held these provisions to be facially overbroad. Like the district court, the Supreme Court invalidated the indecency provision only as it applied to indecent speech; its applications to obscenity were not challenged and remain valid because, as the Court noted, "obscene speech . . . can be banned totally because it enjoys no First Amendment protection."

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[1] In a later case, *Shea v. Reno*, 930 F.Supp. 916 (S.D.N.Y. 1996) *affirmed*, 117 S. Ct. 2501 (1997), another plaintiff challenged the patently offensive provision of the CDA. The court did not accept the argument that this provision was unconstitutionally vague but did invalidate it on grounds of overbreadth.

The Court left no doubt about its view of the capacities and importance of cyberspace as a communication medium. At various points, the Court described the Internet as a "vast democratic fora;" a "new marketplace of ideas;" a "unique and wholly new medium of worldwide human communication" (agreeing with the district court); and a "dynamic, multifaceted category of communication [providing] relatively unlimited low-cost capacity for communication of all kinds." The World Wide Web itself, according to the Court, is "comparable, from the readers' viewpoint, to both a vast library, including millions of readily available and indexed publications and a sprawling mall offering goods and services;" and "from the publishers' point of view, it constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers." Moreover, the Internet:

> includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soap box. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer [117 S.Ct. at 2344].

The Court was also clear about the substantial burdens that the CDA places on cyberspace communications. "[T]he CDA is a content-based blanket restriction on speech." There are "many ambiguities concerning the scope of its coverage," because the statute does not define the term "indecent" or the term "patently offensive" and because each of the challenged provisions uses "a different linguistic form." "Given the vague contours of the coverage of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional protection .... In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another."

Nor do the defenses provided in the statute (section 223(e)(5)) alleviate the statute's burden on cyberspace communication. These defenses depend upon the use of technology to screen communications or to identify users. According to the Court, either the "proposed screening software does not currently exist" or "it is not economically feasible for most noncommercial speakers to employ" the identification or verification technology that is currently available. Thus, "[g]iven that the risk of criminal sanctions 'hovers over each content provider, like the proverbial sword of Damocles,' [quoting Chief Judge Sloviter], the District Court correctly refused to rely on unproven future technology to save the statute. The Government thus failed to prove that the proffered defense would significantly reduce the heavy burden on adult speech produced by the prohibition on offensive displays" [117 S.Ct. at 2349-50].

In language particularly important to educational institutions, the Court specifically recognized that the CDA would burden not only adult speech in general but more specifically speech that is used to convey academic or instructional content. The CDA omits any requirement that the covered speech lack "serious literary, artistic, political, or scientific value" (indeed, Congress had "rejected amendments that would have limited the proscribed materials to those lacking redeeming value" [117 S.Ct. at 2344 fn. 37]), and the CDA therefore covers "large amounts of nonpornographic material with serious educational or other value." Thus, for instance, the speech covered by the statute could " extend to discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalogue of the Carnegie Library" [117 S.Ct. at 2348].

It is settled constitutional law that a regulation burdening the content of speech, as the CDA does, is subject to strict judicial scrutiny -- a standard of review requiring the government to demonstrate that its regulation is supported by a "compelling" government interest and that there are no "less restrictive alternatives" by which the government could effectuate its interest. In *Reno*, the Court refused to craft any exception to these standards for the new medium of cyberspace, and emphatically subjected the statute to "the most stringent review." According to the Court, the medium of cyberspace could not be analogized to the broadcast media and treated more leniently under the law, nor is there any other "basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."

Applying strict scrutiny review to the two challenged CDA provisions, the *Reno* Court acknowledged that the federal government had a compelling interest in protecting children from indecency. But neither provision, in the view of the Court, was drafted with sufficient specificity or "narrow tailoring" to survive the "less restrictive alternative" portion of the test:

> We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech . . . . [The CDA's] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve. . . .
>
> The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA. It has not done so. . . . [T]he CDA is not narrowly tailored if the requirement has any meaning at all. . . .
>
> In *Sable [Communications v. FCC]*, 492 U.S. at 127, we remarked that the speech restriction at issue there amounted to "burn[ing] the house to roast the pig." The CDA, casting a far darker shadow over free speech, threatens to torch a large segment of the Internet community [117 S.Ct. at 2346, 2348, 2350].

The Government also argued (in the Supreme Court but not in the District Court) that "in addition to its interest in protecting children," it has a compelling interest in "fostering the growth of the Internet" that "provides an independent basis for upholding the constitutionality of the CDA." The Court quickly and strongly rejected this alternative argument:

> We find this argument singularly unpersuasive. . . . As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship [117 S.Ct. at 2351].

In her concurring/dissenting opinion, Justice O'Connor attempted to soften the impact of the Court's opinion by preserving some room in which the Government may constitutionally implement content restrictions on cyberspace speech. In particular, Justice O'Connor advocated a theory of "cyberspace zoning" similar to the theory advocated by the Government. But Justice O'Connor's argument depends entirely on future technological advances. She admitted that the technology needed to make "adults only" zones and other zones feasible in cyberspace does not yet exist. If and when it does come into being in a form economically accessible to all, Justice O'Connor would then permit the kind of regulation represented by the CDA. According to Justice O'Connor, "the prospects for the eventual zoning of the Internet appear promising," and "our precedent indicates that the creation of such zones can be constitutionally sound."

Overall, neither the Court's reasoning nor its use of precedent in *Reno* is surprising. The Court's decision is clearly the correct one, although the forecast in Justice O'Connor's opinion is also worth taking to heart. What is somewhat surprising, and noteworthy, is the degree of consensus the Court achieved. In an era when the Court is frequently divided, the near consensus in *Reno* indicates that the constitutional question was not a close one and that the Government's position had little support in precedent. In this context, the Court's strong opinion will likely deter other efforts of Congress and the state legislatures (and higher educational institutions themselves) to regulate cyberspace speech before the technological advances forecast by Justice O'Connor are readily available.

The good news in *Reno* for both public and private educational institutions is that they and their campus communities are now free from the burden of a statute that the Court admitted would have prohibited much communication having educational value. More broadly, if other governmental attempts to regulate cyberspace content arise, public and private campuses can now use the First Amendment to defend themselves from such restrictions. Conversely, the not-so-good news for some public institutions is that they will also be bound by the principles espoused by the *Reno* court and will thus be prohibited from regulating cyberspace communications on their own campuses in much the same way that Congress and the state legislatures are prohibited from doing so under *Reno* (see generally, this Supp., Section 4.18). Private institutions, of course, will not be subject to these same limitations, since the First Amendment binds only the public sector (see LHE 3d, Section 1.5.2).

7.2.18.2. General statutes. In addition to federal statutes focusing predominantly on computer communications (Section 7.2.18.1 above), there are other regulatory statutes that are more general in focus but have been extended by Congressional amendment, judicial interpretation, or administrative regulation to cover computers. The federal obscenity statute that prohibits the sale or distribution of obscene material in interstate commerce (18 U.S.C. §1465), for instance, has been amended to cover obscene communications using interactive computer services (P.L. 104-104, title V, §507, 110 Stat. 56, 137); see, e.g., Donald Stepka, "Obscenity On-Line: A Transactional Approach to Computer Transfers of Potentially Obscene Material," 82 *Cornell L. Rev.* 905 (1997). The federal Copyright Law (LHE 3d, Section 7.2.10) has been amended to provide criminal penalties for distribution of software that infringes the copyright holder's interests (P.L. 102-307 and P.L. 102-561, 106 Stat. 4233, amending 18 U.S.C. §2319 (b), (c)(1), & (c)(2). The Arms Export Control Act and the Export Administration Act (LHE 3d, Section 7.2.1) have been extended by regulation (see the International Traffic in Arms Regulations (ITAR), 22 C.F.R. § 121.1, Category XIII (b)(1), and the Export Administration Regulations (EAR), 15 C.F.R. §§ 738.2 (d)(2), 772, & 774 supp. I) to cover encryption software used to maintain secrecy of computer communications.[2]

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[2] A federal district court has held that some applications of these regulations to encryption software and its components violate the free speech clause of the First Amendment; see *Bernstein v. United States Dept. of State*, 945 F. Supp. 1279 (N.D. Cal. 1996), and *Bernstein v. United States Dept. of State*,

The federal child pornography laws, 18 U.S.C. §§ 2252(a) and 2256, have been amended to proscribe computer transmissions of materials that sexually exploit minors (P.L. 100-690, Title VII §§ 7511(b)-(c), 7512(b), 102 Stat. 4485-4487). The Fraud by Wire, Radio, or Television Communications Act Amendments of 1952, ch. 879, §18(a), 66 Stat. 722 (18 U.S.C. § 1343) has been interpreted by the courts to cover some computer network communications; see *United States v. Seidlitz*, 589 F.2d 152 (4th Cir. 1978); *United States v. Riggs*, 739 F.Supp. 414, 420 (N.D. Ill. 1990). And a federal statute that prohibits communications containing threats to kidnap or injure another person (18 U.S.C. §875(c)) has been applied by the courts to computer communications (see the *Baker* case below).

In the leading higher education case to date, *United States v. Alkhabaz aka Jake Baker*, 104 F.3d 1492 (6th Cir. 1997), *affirming on other grounds*, 890 F. Supp. 1375 (E.D. Mich. 1995), a U.S. Court of Appeals considered the applicability of 18 U.S.C. §875(c) (see above, this section) to a former University of Michigan student who had sent e-mail messages over the Internet. Between November 1994 and January 1995, the defendant, Mr. Baker, exchanged e-mail messages with Arthur Gonda expressing an interest in the rape and torture of women and girls. In addition, Baker had posted various fictional stories involving the "abduction, rape, torture, mutilation, and murder of women and young girls." One of these stories had a character

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1997 WL 530866 (N.D. Cal. 1997). The court's opinions contain excellent analyses of the ITAR and the EAR as applied to encryption technology.

with the same name as one of Baker's classmates at the University of Michigan. Baker was indicted and charged with exchanging e-mail messages that threatened to injure (or, in one instance), to kidnap another person in violation of 18 U.S.C. §875(c).

The federal district court had agreed that the statute applies to computer communications: "While new technology such as the Internet may complicate analysis and may sometimes require new or modified laws, it does not in this instance qualitatively change the analysis under the statute or under the First Amendment" (890 F.Supp. at 1390). Nevertheless the court dismissed the indictment against Baker because the e-mail messages sent and received by Baker and Gonda were "pure speech," that is "constitutionally protected" under the First Amendment. Although threats are excepted from the Amendment's protection, the district court determined that the e-mail messages did not constitute "true threats."

The district court made clear that "statements expressing musings, considerations of what it would be like to kidnap or injure someone, desires to kidnap or injure someone, however unsavory, are not constitutionally actionable . . . absent some expression of an intent to commit the injury or kidnaping." In addition, while the statement need not identify a specific individual as its target, it must be sufficiently specific as to its potential target or targets to render the statement more than hypothetical" (890 F.Supp. at 1386). Applying these standards to Baker, the court found that his messages communicating a desire to kidnap or injure young girls merely expressed his desire to commit these acts, not an actual intention to act on those desires.

There was this same lack of intent in the messages that detailed a method of abduction of a female student in the defendant's dormitory. As a result, the district court held that the statements in the defendant's private electronic mail, or e-mail messages to Mr. Gonda, did not meet the First Amendment "true threat" requirement.

While the district court decision focused heavily on First Amendment analysis, the Court of Appeals, in upholding the decision, focused on the interpretation of the statute under which Mr. Baker was indicted. Title 18, Section 875(c) states:

> Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.

In order to constitute a "communication containing any threat," a communication must be such that a reasonable person (1) would take the statement as a serious expression of an intention to inflict bodily harm . . ., and (2) would perceive such expression as being communicated to effect some change or achieve some goal through intimidation."

In applying this standard to the facts of this case, the Court of Appeals determined that the messages sent and received by Mr. Baker did not constitute a "communication containing any threat" under Section 875(c). The Court reasoned that, "even if a reasonable person would take the communications between Baker and Gonda as serious expressions of an intention to inflict bodily harm, no reasonable person would perceive such communications as being conveyed to effect some change or achieve some goal through intimidation." "Although it may offend our sensibilities," the court remarked, "a communication objectively indicating a serious expression of an intention to inflict bodily harm cannot constitute a threat unless the communication is also conveyed for the purpose of furthering some goal through the use of intimidation." (In contrast, a dissenting judge argued that, "by publishing his sadistic Jane Doe story on the Internet, Baker could reasonably foresee that his threats to harm Jane Doe would ultimately be communicated to her (as they were), and would cause her fear and intimidation, which in fact ultimately occurred.") Since the indictment failed to meet the requirements of Section 875(c) as it interpreted them, the appellate court declined to address the First Amendment issue.

The growing application of federal law (especially criminal law) to computer networks has a dual message for higher educational administrators. First, they must be sensitive to the increased risks of liability for the institution and the members of its campus community that may arise when third parties claim harm resulting from the use or administration of the institution's computer networks. Second, they must consider the role that *external* federal law enforcement should play in the institution's strategies for dealing with computer misuse. Most institutions, of course, will have their own regulations -- for example, a student disciplinary code or a computer misuse policy -- that can be used to combat abuses; but just as with problems like campus demonstrations (LHE 3d, Section 4.9.4), campus sexual assaults, or campus drug use, institutional interests regarding computer abuse may sometimes be better served by seeking the assistance of law enforcement authorities in addition to or in lieu of processing the matter internally.

7.2.19. [new section] Medicare. New attention has been focused on the federal Medicare program due to various recent events -- including federal audits of medical school billing practices (see, e.g., Douglas Lederman,"U.S. Investigates Medicare Billing: Penn Agrees to Repay $30-Million," *The Chronicle of Higher Education*, A38 (Jan. 5, 1996) and Paulette Campbell, "U.S. Drops 16 of 49 Audits Over Medicare Billing by Schools," *The Chronicle of Higher Education*, A30 (July 25, 1997); issuance of new federal regulations (see, e.g., 60 Fed.Reg. 63124, Dec. 8, 1995); and a major U.S. Supreme Court case (*Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994). Most of the controversy concerns the role of teaching hospitals as Medicare providers and the "rules" by which they are paid or reimbursed for the delivery of medical services. These rules are highly technical and intricate, and are of particular interest to institutions with medical schools.

Some background is necessary to provide context for the recent developments. The method and rate of reimbursement afforded to a provider depends on the type of service the provider offers: an in-patient facility, like a hospital, is generally reimbursed under Medicare Part A; out-patient and physician services are generally covered under Medicare Part B. Generally, Part A covers institutional services, which are reimbursed on a "reasonable cost" basis, and Part B covers supplemental medical services, which are reimbursed on a "reasonable charge" basis. (See C. Hitchner, "Medicare and Medicaid Reimbursement of Teaching Hospitals and Faculty Physicians," 10 *J. Coll. & Univ. Law* 79 (1983-84).)

A Medicare service provider, under part A, which may be a skilled nursing facility, home health agency, hospice program, or rural health clinic, as well as a hospital (as defined at 42 U.S.C. §§1395x, 1395i-3) enters into an agreement with the Secretary of Health and Human Services ("Secretary") to receive reimbursement for the "reasonable cost" of services provided to Medicare recipients (42 U.S.C. §§1395cc, 1395ww). The provided agreement requires that the provider not charge "any individual . . . for items or services for which such individual is entitled to have payment made under [Medicare]" (42 U.S.C. §1395cc(a)(1)(A)). Under 42 U.S.C. section 1395cc(a)(F)(I), in-patient hospitals must agree to:

> maintain an agreement with a professional standards review organization . . . or with a utilization and quality control peer review organization . . . [that will] review the validity of diagnostic information provided by such hospital, the completeness, adequacy and quality of care provided, the appropriateness of admissions and discharges, and the appropriateness of care provided for which additional payments are sought under section 1393ww(d)(5) [a provision on hospital stays which exceed the "mean length of stay"].

Teaching hospitals are allowed to claim costs under Medicare for educational activities that are "customarily or traditionally carried on by providers in conjunction with their operations" (42 C.F.R. §413.85(c)). Such activities encompass both direct and indirect costs (42 C.F.R. §413.85(g). Reimbursement is based on the net costs of approved educational activities, and net costs are determined by deducting tuition revenues from a provider's total costs for these activities. "For this purpose, *a provider's total costs include trainee stipends, compensation of teachers, and other direct and indirect costs of the activities* as determined under the Medicare cost-finding principles in §413.24" (42 C.F.R. § 413.85 (g); emphasis added). Research costs beyond those incurred for "usual patient care" are not includable as "allowable costs" (42 C.F.R. §413.90 (a)).

In order to receive reimbursement, a provider must file a reimbursement claim with an intermediary fiscal agent ("intermediary"). An intermediary acts under contract with the Secretary and is responsible for reviewing the provider claims and making initial reimbursement determinations (42 U.S.C. §1395h). A provider may contest denial of reimbursement by requesting a hearing before the Provider Reimbursement Review Board ("PRRB"), a board within the Department of Health and Human Services that has exclusive jurisdiction over Medicare reimbursement claims (42 U.S.C. §1395oo). The Secretary may, on his own motion, review the decision of the PRRB. In addition, providers have the right "to obtain judicial review of any action of the fiscal intermediary which involves a question of law or regulations relevant to the matters in controversy where the [PRRB] determines (on its own motion or at the request of a provider of services . . .) that it is without authority to decide the question" (42 U.S.C. §1395oo(f)(1)).

From inception of the Medicare program, reimbursements have been an important means of support for graduate medical education ("GME"), that is, the clinical internship and residency programs for doctors who have received their M.D. degrees. Hospital costs associated with GME include the salaries of residents and interns and costs of recruiting and maintaining an experienced teaching staff. The Medicare program affords special treatment to GME by providing reimbursement for the "provider's allowable cost [which] may include its net cost of approved educational activities" (42 C.F.R.§413.85(a)). "Approved educational activities" are "formally organized or planned programs of study usually engaged in by providers in order to enhance the quality of patient care in an institution" (42 C.F.R. §413.85(b)). Thus teaching hospitals may recover the cost of training residents and interns through Medicare reimbursement (42 C.F.R. §413.86(c)-(d)). Under the "related organization principle," costs incurred by an affiliated medical school in connection with the GME program may also be allowable; the regulations provide that "costs applicable to services, facilities, and supplies furnished to the provider by organizations related to the provider by common ownership or control are includable in the allowable cost of the provider at the cost to the related organization" (42 C.F.R. §413.17(a)).

In addition, staff physicians at teaching hospitals who render services to Medicare recipients may also be eligible for reimbursement. According to the statute:

> [P]ayment under this part [Part A] shall be made to such fund as designated by the organized medical staff of the hospital in which such services were furnished or, if such services were furnished in such hospital by the faculty of a medical school, to such fund as may be designated by such faculty, but only if -- (1) such hospital has an agreement with the Secretary under section 1395cc of this title, and (2) the Secretary has received written assurance that (A) such payment will be used by such fund solely for the improvement of care of hospital patients or for educational or charitable purposes and (B) the individuals who were furnished such services or any other persons will not be charged for such services (or if charged, provision will be made for return of any moneys incorrectly collected [42 U.S.C. §1395f(g)].

There are, however, important limits built into the reimbursement regulations. In particular, regarding the educational activities of in-patient providers:

> It is recognized that the costs of such educational activities should be borne by the community. However, many communities have not assumed responsibility for financing these programs and it is necessary that support be provided by those purchasing health care. Until communities undertake to bear these costs, the [Medicare] program will participate appropriately in the support of these activities. *Although the intent of the [Medicare] program is to share in the support of educational activities customarily or traditionally carried on by providers in conjunction with their operations, it is not intended that this program should participate in increased costs resulting from redistribution of costs from educational institutions or units to patient care institutions or units* [42 C.F.R. §413.85(c) (1995) (emphasis added)].

The first part of this regulation is the "community support" provision, and the second part (in italics) is the "anti-redistribution" provision. The interpretation of the second provision was at issue in the *Thomas Jefferson University* case decided by the U.S. Supreme Court.

In 1985, Thomas Jefferson University Hospital ("Hospital") hired an independent accounting firm to review and calculate the hospital's GME costs, particularly in light of the 1984 amendments to the Medicare statute, and to refine its "cost allocation techniques." On the advice of the accounting firm, the hospital submitted to the intermediary a reimbursement claim for $8.8 million, $2.9 million of which represented previously unclaimed direct and indirect administrative costs associated with the hospital's residency program. Previously, the hospital had claimed and received reimbursement for "three categories of salary-related GME costs: (1) salaries paid by the Hospital to Medical College faculty for services rendered to the Hospital's Medicare patients; (2) salaries paid by the Hospital to residents and interns; and, (3) funds transferred internally from the Hospital to the Medical College as payment for faculty time devoted to the Hospital's GME program" (114 S. Ct. at 2385). It was not until after the accounting firm review that the hospital sought reimbursement for non-salary related GME costs, such as the cost of administering the hospital's GME program.

The intermediary denied the hospital's claim as to all non-salary related GME costs. At the hospital's request, the PRRB reviewed and reversed the intermediary's decision. The Secretary intervened on her own motion and reinstated the decision of the intermediary, basing her decision on the anti-redistribution principle: "[s]ince the non-salary GME costs here in issue were born in prior years by the Medical College, . . . reimbursement of these costs would constitute an impermissible 'redistribution of costs' under §413.85(c) [of the regulations]" (114 S.Ct. at 2386). Furthermore, the Secretary reasoned that the hospital's failure to claim the costs in years past indicated "community support" for the costs of the program [under §413.85(c) (114 S.Ct. at 2386).

Following general principles of administrative law, the Court in *Thomas Jefferson* deferred to the Secretary's interpretation of the regulations, determining that it was neither "plainly erroneous nor inconsistent with the regulation" (114 S.Ct. at 2387). By a 5 to 4 vote, the Supreme Court upheld the Secretary's decision to deny reimbursement to the hospital:

> The Secretary's reading is not only a plausible interpretation of the regulation; it is the most sensible interpretation the language will bear. The circumstance addressed by the anti-redistribution clause is a hospital's submission of "increased costs" arising from approved educational activities. The regulation provides, in unambiguous terms, that the "costs" of these educational activities will not be reimbursed when they are the result of a "redistribution," or shift, of costs from an "educational" facility to a "patient care" facility, even if the activities that generated the costs are the sort "customarily or traditionally carried on by providers in conjunction with their operations." §413.85(c) The Secretary's reliance on a hospital's own historical cost allocations, along with those of an affiliated medical school, is a simple and effective way of determining whether a prohibited "redistribution of costs" has occurred. Indeed, one would be hard-pressed to come up with

> an alternative method to identify the shifting of costs from one entity to another [114 S.Ct. at 2387].

Interestingly, the Secretary did not assert that the types of non-salary costs for which the hospital sought reimbursement were unallowable, but rather that the hospital's timing and procedure for seeking reimbursement made these costs unallowable. Had the hospital claimed the non-salary administrative costs from the beginning (it is not clear from the record why the hospital did not do so), Medicare apparently would have reimbursed these costs.

For a review of the *Thomas Jefferson* decision and its implications, along with background on the Medicare statute and regulations, see Kellyann Horger, "Medicare Reimbursement to Provider University Hospitals for Graduate Medical Education Expenses in Light of *Thomas Jefferson University v. Shalala*," 23 *J. of Coll. & Univ. L.* 122 (1996); Paul Koster, "*Thomas Jefferson University v. Shalala*: Dollars or Sense? The Illogical Restriction of Medicare's Funding of Graduate Medical Education," 12 *J. of Contemp. Health Law & Pol.* 269 (1995). For another case raising technical issues about other medicare regulations on re-auditing of a teaching hospital's GME costs, see *St. Paul-Ramsey Medical Center v. Shalala*, 91 F.3d 57 (8th Cir. 1996), *cert. granted*, 1997 WL 107183 (U.S. S. Ct. 1997).

Sec. 7.3. Federal Taxation of Postsecondary Education

7.3.1. Income tax laws. The United States Court of Appeals has reversed the district court decision in the *Michigan Education Trust (MET)* case (LHE 3d, pp. 779-780). In *State of Michigan v. United States*, 40 F.3d 817 (6th Cir. 1994), the court ruled that *MET* is a governmental entity serving governmental purposes on behalf of the state, and has a constitutional immunity from taxation that Congress has not abrogated. The decision serves to enhance the attractiveness of pre-paid tuition programs in the states; see Patrick Healy, "Pay Now, Study Later: More State Legislatures are Moving to Create Pre-Paid Tuition Programs," *The Chronicle of Higher Education* A19 (May 31, 1996).

7.3.2. Social Security taxes. The statutory exemption for students who are also institutional employees (LHE 3d, p. 783; see 26 U.S.C. §3121(b)(10), 42 U.S.C. §§ 410(a)(10) & 418(c)(5)) was at issue in *State of Minnesota v. Chater* (D.Minn. 1997) (available at http://chronicle.com/che-data/focus.dir/xtra4339.dir/umn.htm). The federal district court ruled that the medical residents at the University of Minnesota are primarily students rather than employees because their " 'main purpose' . . . is to pursue a course of study, rather than earn a livelihood." The residents were therefore excluded from coverage under the Social Security Act, and the state was not liable for social security contributions on their behalf. More litigation on this issue is likely.

Sec. 7.4. Federal Aid-to-Education Programs

7.4.2. Legal structure of aid programs. The Department of Health and Human Services (HHS) and the National Science Foundation have promulgated "rules of the game" on financial conflicts of interest. See this Supplement, Section 9.4.7.

7.4.3. "Cross-cutting" aid conditions. Under various provisions of recent authorization and appropriation acts (see, e.g., the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186 (Div. A, Title V, §541), codified at 10 U.S.C. §983; the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (Div. A, Title V, § 558); and the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (Div. A, Title I, §101(e) & Title V, § 514), no funds available under appropriations acts for the Departments of Defense, Transportation, Labor, Health and Human Services, and Education, or for "Related Agencies," may be provided to an institution of higher education that bars military recruiters from the campus or that has an "anti-ROTC policy." These laws were promulgated in response to opposition on some college campuses to the military services' policies and ROTC policies that exclude acknowledged gays and lesbians from military service and ROTC membership.

Congress has authorized the Secretary of Defense to make the determinations regarding which institutions are in violation of these laws and to publish findings in the Federal Register. Other federal departments whose funds are affected must determine which of their programs provide funds to institutions by "contract or grant" within the meaning of the authorization and appropriation acts (rather than providing funds directly to students) and are thus subject to these restrictions.

7.4.5. Protecting institutional interests in disputes with funding agencies. The U.S. Supreme Court clarified the scope and limits of the *Rust* case (LHE 3d, pp. 797-798) in its later decision in *Rosenberger v. Rector and Visitors of the University of Virginia* (this Supp., Section 4.11.4). The Court drew a distinction in *Rosenberger* between situations (like *Rust*) in which the government is a speaker and "enlists private entities to convey its own [favored] message;" and situations (like *Rosenberger*) in which the government subsidizes "private speakers who convey their own messages" and are not the government's agents:

> [W]hen the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. In the same vein, in *Rust v. Sullivan, supra*, we upheld the government's prohibition on abortion-related advice applicable to recipients of federal funds for family planning counseling. There, the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized

> that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. *500 U.S. at 194.* When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee. See *id., at 196-200.*
>
> It does not follow, however, and we did not suggest in Widmar, that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles [115 S.Ct. at 2518-19].

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In a later related development, the U.S. Court of Appeals for the Ninth Circuit upheld the district court's decision in the *Finley* case (LHE 3d, pp. 799-800). *Finley v. National Endowment for the Arts*, 100 F.3d 671 (9th Cir. 1996). Like the district court, the appellate court distinguished the *Rust* case (LHE 3d, pp. 797-798). But the appellate court had additional grounds upon which to do so because the U.S. Supreme Court had decided the *Rosenberger* case (this Supp., Section 4.11.4) after the district court's decision but before that of the appellate court. Applying *Rosenberger*, the court reasoned that the NEA's role under its legislation was to "encourage a diversity of views from private speakers" (quoting *Rosenberger*, 115 S. Ct. at 2519), and that the First Amendment required the NEA to do so without discriminating on the basis of viewpoint. The "decency and respect" clause violated this requirement of viewpoint neutrality:

> [W]e cannot agree with NEA's assertion that the "decency and respect" provision does not reflect viewpoint discrimination. In *Rosenberger*, the Supreme Court found viewpoint discrimination in a university regulation that "select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints." 115 S. Ct. at 2517. Central to the court's decision was the fact that under the regulation, any topic treated from a religious perspective would be denied funding. See id. ("Religion . . . provides . . . a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments.") Here too, it is the treatment of a subject, not the subject itself, that is disfavored. Two depictions of the same subject matter -- an American flag, for example -- could be treated differently if NEA believed one depiction symbolized an "indecent" perspective or demonstrated disrespect for "the diverse beliefs and values of the American public," and the other did not [100 F.3d at 682-683].

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In another post-*Rust* case, *Board of County Commissioners v. Umbehr*, 116 S. Ct. 2342 (1996), the U.S. Supreme Court has indicated what analysis would apply to a situation in which government seeks to regulate the content of a grantee or contractor's private speech that is not within the scope of the activities government has funded. In particular, *Umbehr* addresses the situation where government officials terminate or refuse to renew a contract or grant because they disagree with or take offense at views expressed by the contractor or grantee. The Court ruled in *Umbehr* that contractors and grantees do have first amendment protections in such circumstances which are comparable to those of public employees (see LHE 3d, Section 3.7.1). Thus, if a government agency or official were to penalize a contractor or grantee for speech on matters "of public concern" (*Connick v. Myers*, 461 U.S. 138 (1983)), the government could not rely on *Rust* and the contractor or grantee would often be protected.

Sec. 7.5. Civil Rights Compliance

7.5.2. ***Title VI.*** After the decision of the U.S. Supreme Court in *Fordice* (LHE 3d, pp. 809-813), the U.S. Court of Appeals for the Fifth Circuit reversed the prior ruling of the district court and remanded for further proceedings. *Ayers v. Fordice*, 970 F. 2d 1378 (5th Cir. 1992). Although the parties attempted to settle the case for nearly two years, they were unable to agree, and trial began in May of 1994. One hundred three witnesses testified over a period of ten weeks. The ruling of the district court (879 F. Supp. 1419 (N.D. Miss. 1995)) extends for 83 pages and considers a wide range of issues including admission standards, collegiate missions and the duplication of academic programs, racial identifiability of the campuses, the campus climate, and how the institution's and state's policies and practices interacted to perpetuate segregation. The court rejected the defendants' proposal that the state merge two pairs of historically white and historically black colleges, ordering them to consider other alternatives to ascertain if they would be more successful in reducing racial identifiability of the campuses.

Although the findings of the district are numerous and complex, several illustrative findings will be discussed briefly. The court found that the admissions standards proposed by the state were discriminatory, and that use of scores on the American College Test as the sole criterion for admission was also discriminatory, but that the use of ACT scores for awarding scholarships was not discriminatory. The court approved the defendants' proposal for uniform admission standards for all Mississippi colleges and universities, rejecting the plaintiffs' argument that some of the colleges should have open admissions policies until greater racial balance was achieved. Regarding institutional missions, the court ruled that the limited missions allocated to the historically black institutions were a vestige of segregation, and ordered a study of program duplication, commenting that not all duplication necessarily resulted in segregation. The judge also ruled that funding should not be completely tied to institutional mission, given that mission assignments were made during the period of segregation.

The U.S. Department of Justice appealed the decision of the district court. In April of 1997, the U.S. Court of Appeals for the Fifth Circuit upheld part of the district court's findings, reversed another part, and remanded for further proceedings (111 F.3d 1183 (5th Cir. 1997)). The appellate court held that the financial aid policies of the historically white colleges perpetuated prior discrimination on the basis of race, but that the uniform admissions standards proposed by the state were appropriate. The court also directed the district court to amend the remedial decree to require the state to submit proposals for increasing the enrollment of white students at several historically black institutions.

The litigation in Louisiana (LHE 3d, pp. 808-809) has subsided and the Department of Justice and a federal judge approved a plan that would increase spending at several historically black institutions, would create one governing board for the state's public colleges rather than four, but would not result in the merger of any institutions. "Court Backs College Plan in Louisiana," *New York Times*, October 15, 1994, A24; "The Country's Only Historically Black Public-College System Would be Split Up . . .," *The Chronicle of Higher Education*, February 2, 1996, A26.

The litigation has, however, continued in Alabama (LHE 3d, pp. 813-14). On remand from the 1994 ruling of the U.S. Court of Appeals for the Fifth Circuit, the trial court, applying *Fordice*, analyzed the plaintiffs' contentions that the policies and practices of the university system had present segregative effects. The court made over six hundred findings of fact on a wide range of issues, including funding, program duplication, accreditation status, budget decisions, and the placement of new degree programs. The court rejected the plaintiffs' assertion that the absence of black studies programs at some of the historically white institutions was evidence of present segregative effects. It also ordered that funding be allocated to two historically black institutions for scholarships, program development, faculty salary enhancement, and other mechanisms to increase the quality and attractiveness of these institutions to students.

For analysis of the Mississippi and Alabama cases post-*Fordice*, see Scott L. Sroka, "Discrimination Against Students in Higher Education: A Review of the 1995 Judicial Decisions," 23 *J. of Coll. & Univ. L.* 431 (1997).

7.5.3. Title IX. Since the publication of LHE 3d, there has been a great deal of activity, both in the courts and within the Office for Civil Rights, concerning the extent of liability of an institution for hostile environment harassment by employees and by a student's peers. (Quid pro quo harassment of students by faculty is discussed in LHE 3d and in this Supplement in Section 4.7.3) The federal appellate courts are divided on several of these issues; the Office for Civil Rights issued guidelines in March of 1997 that create a standard of institutional liability with which some, but not all, federal appellate courts concur. Moreover, most of the litigation has been initiated by public school students against school districts, which makes interpretation of these court opinions for postsecondary institutions somewhat difficult. Therefore, this Section will sketch out some of the issues facing colleges, and will describe the unsettled nature of the law as this Supplement went to press.

Although an institution's liability for quid pro quo harassment by a teacher or other employee is fairly well established (see the *Franklin* case, discussed in LHE 3d at pages 816-817), the law is still developing with respect to hostile environment sexual harassment of a student by a teacher or other employee. One of the issues that has been difficult for courts to grapple with is whether to hold an institution liable under Title IX for hostile environment harassment by a teacher if no report of the harassment had been made to someone in authority -- in other words, whether an institution can be held liable for hostile environment sexual harassment by an employee if institutional officials were unaware of the harassment. The OCR's *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12034 (March 13, 1997) states that liability for harassment by teachers or other school employees is governed by agency principles (62 Fed. Reg. 12039). The *Guidance* states:

> A school will . . . be liable for hostile environment sexual harassment by its employees . . . if the employee -- (1) acted with apparent authority (i.e., because of the school's conduct, the employee reasonably appears to be acting on behalf of the school, whether or not the employee acted with authority); or (2) was aided in carrying out the sexual harassment of students by his or her position of authority with the institution. . . If the school fails to take immediate and appropriate steps to remedy known harassment, then the school will be liable under Title IX [62 Fed. Reg. at 12039].

For example, if the school employee had the authority to discipline a student, or to evaluate the student's academic performance, a student might believe that the employee was acting under the school's authority, and the school could be liable for the harassment even if it had not been reported to school officials. This standard is similar to that used in Title VII hostile environment cases, and is sometimes called the "knew or should have known" standard. It was applied by the U.S. Court of Appeals for the Second

Circuit in *Kracunas and Pallett v. Iona College*, 119 F.3d 80 (2d Cir. 1997). That court held:

> if a professor has a supervisory relationship over a student, and the professor capitalizes upon that supervisory relationship to further the harassment of the student, the college is liable for the professor's conduct. If a professor does not rely upon his actual or apparent authority to carry out the harassment, the college will be liable only if it provided no reasonable avenue for complaint or if it knew, or in the exercise of reasonable care should have known, about the harassment yet failed to take appropriate remedial action [119 F.3d at 88].

(This case is discussed more fully in this Supplement, Section 4.7.3).

In cases decided prior to the release of the OCR Guidance, some courts refused to find liability in the absence of clear evidence that the school's top official(s) knew of the harassment. For example, in *Canutillo Independent School District v. Leija*, 101 F.3d 393 (5th Cir. 1996), *rehearing denied*, 106 F.3d 399 (5th Cir. 1997), *cert. denied*, 65 U.S.L.W. 3814 (1997), a second grader alleged sexual abuse by her health teacher during the showing of movies in a darkened classroom. Both the student and her mother discussed the sexual molestation with the student's homeroom teacher, who said she would look into it. The teacher did not report the allegations to the principal or to any other school district official. The court rejected the argument that the school district should be strictly liable for sexual harassment under Title IX. Nonetheless, the court declined to decide whether

Title VI, Title VII, or the Restatement of Agency provided the appropriate standard for school district liability. The court reasoned that under any of these standards, the issue concerned notice to the school district. The court held that notice to the homeroom teacher did not constitute sufficient notice to the school district because the teacher had no supervisory authority over other teachers, nor did she have authority to take remedial action. The court stated that, under certain circumstances, providing notice to the school district may require informing the school board itself.

Similarly, in *Rosa H. v. San Elizario Independent School District*, 106 F.3d 648 (5th Cir. 1997), the court determined that in order to hold a school district liable under Title IX for a hostile educational environment created by a teacher, "a plaintiff must show that an employee who has been invested by the school board with supervisory powers over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so." In refusing to apply the "knew or should have known" standard of Title VII, the court held that "importing this aspect of Title VII law stretches Title IX beyond its language and purpose. Congress did not enact Title IX in order to burden federally funded educational institutions with open-ended negligence liability" (106 F.3d at 656). The court relied on its earlier holding in *Rowinsky* (discussed in the Section on peer harassment) and reiterated that Title IX requires a showing of "actual, intentional discrimination on the part of the school district." (The reasoning and result of *Canutillo* and *Rosa H.* were criticized in the preamble to the OCR *Guidance*, 62 Fed. Reg. at 12036.)

On the other hand, in *Kinman v. Omaha Public School District*, 94 F.3d 463 (8th Cir. 1996), the court applied the "knew or should have known" standard of Title VII in a case in which the student alleged that she was subjected to a hostile sexual environment by her same-sex teacher. The appeals court remanded the case for trial "regarding exactly when the defendants obtained knowledge of the relationship between [the teacher] and [the student] and whether, once they obtained this knowledge, they took reasonable steps to remedy the situation" (94 F.3d at 469). The U.S. Court of Appeals for the Sixth Circuit also approved the application of Title VII liability principles in *Doe v. Claiborne County*, 103 F.3d 495 (6th Cir. 1996), which involved the alleged statutory rape of a student by a high school physical education teacher and coach.

Although courts have found it difficult to determine the standard of liability for hostile environment harassment by faculty, those courts that have been faced with the necessity of determining whether a college or school is liable for harassment by a student's peers have had even greater difficulty. In March of 1997, the Office for Civil Rights addressed the liability of a school or college for peer sexual harassment in its *Guidance* (cited above). The *Guidance* states that schools (including colleges) may be liable under Title IX for harassment of a student by peers if "(i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action" (62 Fed. Reg. 12039). The *Guidance* also addresses how a school or college may avoid Title IX liability for peer harassment:

> [I]f, upon notice of hostile environment harassment, a school takes immediate and appropriate steps to remedy the hostile environment, the school has avoided violating Title IX . . . Title IX does not make a school responsible for the actions of harassing students, but rather for its own discrimination in failing to remedy it once the school has notice [62 Fed. Reg. at 12039-12040].

In other words, the *Guidance* states that failing to remedy the harassment may lead to liability -- a standard that differs sharply from the rulings of some federal appellate courts prior to the issuance of the *Guidance*.

The most widely-cited federal appellate opinion to address institutional liability for peer harassment has been *Rowinsky v. Bryan Independent School District*, 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 165 (1996). In this case, the court denied relief under Title IX because the plaintiff could not show that the school district responded to sexual harassment claims differently based on sex. Under the *Rowinsky* approach, the plaintiff must show more than that an institution's action or inaction intentionally permitted a hostile environment to continue; the plaintiff must also affirmatively show that the institution, once on notice of the alleged harassment, treated complaints from female students differently from those of male students. In other words, *Rowinsky* requires the plaintiff to demonstrate intentional discrimination by the school or college, rather than negligence.

The preamble to the OCR *Guidance* is critical of *Rowinsky*, stating that it was "wrongly decided" because it was based on "a mistaken belief that the legal principle underpinning this aspect of the Guidance makes a school responsible for the actions of a harassing student, rather than for the school's own discrimination in failing to respond once it knows that the harassment is happening" (62 Fed. Reg. at 12036).

Not surprisingly, trial courts in the Fifth Circuit have followed *Rowinsky*. In *Piwonka v. Tidehaven Independent School District*, 961 F. Supp. 169 (S.D. Tex. 1997), the district court rejected a high school student's Title IX claim stemming from sexual assaults by other students on school property because the plaintiff could not demonstrate that the school handled complaints of peer harassment brought by female students any differently than it handled complaints brought by male students. The *Piwonka* court, however, stated that it neither condoned nor encouraged the behavior described, and urged the plaintiff to "strongly consider seeking appropriate criminal charges or pursuing state law assault claims against the offending students in the proper state law tribunals" (961 F. Supp. at 171).

Other federal appellate courts, however, have fashioned liability standards that are much closer to the OCR *Guidance* than to the holding in *Rowinsky*. In *Davis v. Monroe County Board of Education*, 74 F.3d 1186 (11th Cir.), *vacated, pending reh'g en banc*, 91 F.3d 1418 (11th Cir. 1996), the student alleged that she had told the principal about sexual harassment by other students and that several teachers also were aware of the offensive conduct, yet the school failed to take prompt action to stop the harassment. The appellate panel held that Title IX encompasses a claim for damages due to a sexually hostile educational environment created by peers when the supervising authorities knowingly fail to act to eliminate the harassment. The court set forth five elements the plaintiff must prove to establish a prima facie claim of peer harassment:

> (1) that she is a member of a protected class; (2) that she was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of her education and create an abusive educational environment; and (5) that some basis for institutional liability has been established [74 F.3d at 1194 (citing *Meritor* and *Harris v. Forklift Systems)* (see LHE 3d, p. 244)].

The court held that the last element could be satisfied by showing that school officials knew or should have known of the harassment and failed to take "prompt and remedial action to end the harassment" (74 F.3d at 1195).

As this *Supplement* went to press, the U.S. Court of Appeals for the Eleventh Circuit, sitting *en banc*, reversed the earlier ruling of the panel. *Davis v. Monroe County Board of Education*, 120 F.3d 1390 (11th Cir., 1997). The court, over a vigorous dissent by judges who participated in the earlier panel decision, used a Spending Clause analysis to rule that when it accepted federal funds, the school district had not known that it could be liable for peer sexual harassment. Although the school district could have expected to face liability for sexual harassment by its employees, said the court, "Congress gave no clear notice to schools and teachers that they, rather than society as a whole, would accept responsibility for remedying student-to-student sexual harassment when they chose to accept federal financial assistance under Title IX" (120 F.3d at 1406).

Given the ruling of the *en banc* court in *Davis*, the precedents established in other federal circuits whose courts had relied upon the panel decision are vulnerable. For example, the Tenth Circuit in *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996) approved of the panel's analysis in *Davis*, but found that there had been no gender-based harassment. In *Seamons*, the plaintiff had claimed that the institution's response to his harassment complaint, rather than the harassing conduct itself, had violated Title IX standards (an argument that is consistent with the recently-issued OCR *Guidance*). The high school student had been grabbed as he came out of the shower by fellow members of the football team, was forcibly restrained and bound to a towel rack, had his genitals taped, and then was displayed in this condition to a girl who used to date him. The student reported the assault to the coach, who told him to "take it like a man," that the incident was a "prank," and that "boys will be boys." The coach then required the student to apologize to his harassers for "betraying the team" by reporting the incident. When the student refused to apologize, the coach dismissed him from the team; the school district responded by canceling the final football game of the year, an important state playoff game. Subsequently, the student was harassed by his peers for being "the cause of the football team's demise."

Taking great pains to note that the student-plaintiff did not base his Title IX claim on the actual locker room assault, the court of appeals found that the peer harassment was not based on his gender, but rather upon his response to the assault:

> [The plaintiff] has failed to allege facts sufficient to indicate that the conduct being challenged (which it must be remembered, post dates the locker room assault) was "sexual" in nature, as defined in the hostile environment context. [The plaintiff] fails to allege any facts that would suggest he was subjected to unwelcome sexual advances or requests for sexual favors, or that sex was used to contribute to a hostile environment for him [84 F.3d at 1222-23].

In other words, neither the hostile response of his fellow students to the cancellation of the football game, which they blamed on him, nor the response of the school officials, was related to the student's gender, according to the court. Therefore, no Title IX violation was found. The court expressly declined to decide "what liability, if any, the school district might have for the acts of its students" (84 F.3d at 1232 n.7).

In a same-sex peer harassment case in the higher education context, a graduate student asserted a hostile environment Title IX claim as a result of the alleged peer harassment, and retaliation claims, alleging a long list of adverse effects he suffered at the hands of university administrators after lodging the peer harassment complaint. In *Linson v. University of Pennsylvania*, No. 95-3681, 1996 U.S. Dist. LEXIS 12243 (E.D. Pa. August 21, 1996), the court examined prior case law and held that a peer harassment claim was viable under Title IX. The court concluded, however, that the plaintiff failed to point to any evidence that the adverse actions he suffered sufficed to constitute gender discrimination. Indeed, the plaintiff himself had claimed that these adverse actions were the result of his pursuing a sexual harassment claim. After noting that the university took prompt remedial action, the court therefore dismissed the plaintiff's Title IX hostile environment claim. The court also dismissed the plaintiff's retaliation claim, noting a complete lack of causation between the university's actions toward him and his exercise of rights under Title IX.

In another harassment case involving a postsecondary institution, the plaintiff, who had been accused of sexual harassment by a fellow student, alleged that his treatment by the institution violated Title IX because the investigation and adjudicatory practices favored female complainants. In *Haley v. Virginia Commonwealth University*, 948 F. Supp. 573 (E.D. Va. 1996), the plaintiff was a student who had been found guilty of sexual harassment in his position as an employee and student of VCU. Following his separation from the university, he sued VCU for, among other things, violation of his Title IX rights based on the way the university handled the sexual harassment charges against him. (See LHE 3d, Sections 4.5 and 4.6.) The court dismissed the Title IX claim, explaining that the allegations "at best reflect a bias against people accused of sexual harassment and in favor of victims and indicate nothing about gender discrimination" [948 F. Supp. at 580].

Although the federal appellate courts are divided on whether liability attaches under the *Rowinsky* standard or under the OCR standard, there is somewhat more agreement among district courts concerning whether a plaintiff must demonstrate that the school or college had actual notice, rather than constructive notice under Title VII's "knew or should have known" standard. In *Bruneau v. South Kortright Central School District*, 935 F. Supp. 162 (N.D.N.Y. 1996), the court found that constructive notice of peer harassment was insufficient to support Title IX liability. Similarly, in *Wright v. Mason City Community School District*, 940 F. Supp. 1412 (N.D. Iowa 1996), the court rejected the "knew or should have known" standard as insufficient and held that the school must know of the harassment and intentionally fail to act.

Conversely, on remand from the U.S. Court of Appeals for the Ninth Circuit in *Doe v. Petaluma City School District*, 54 F.3d 1447 (9th Cir. 1994), the district court granted reconsideration and revised its holding to state that the appropriate standard of liability in a peer harassment case is that of Title VII, *i.e.*, the "knew or should have known" standard (*Doe v. Petaluma School District* ("Petaluma III"), 949 F. Supp. 1415 (N.D. Cal. 1996)). This opinion also contains a thoughtful discussion and critique of *Rowinsky*.

At present, the majority of lower courts follow the approach adopted by the OCR *Guidance*. However, further litigation, and perhaps U.S. Supreme Court review, will be necessary to resolve the differences among the circuits and to establish what authority courts will afford the OCR *Guidance*.

Despite the apparent clarity of the *Guidance*, federal courts may still be uncertain about the standard to apply to claims of Title IX liability for alleged peer harassment. For example, in *Collier v. William Penn School District*, 956 F. Supp. 1209 (E.D. Pa. 1997) (decided after the draft *Guidance* had been released but before the final version was published), the court commented:

> While we are permitting plaintiff's case to go forward, we caution that not every unwanted interaction of a physical or sexual nature between adolescents states a Title IX claim against a school district. While sexual overtures or contact between a teacher and a student is undeniably out of bounds, a similar relationship between adolescents does not necessarily constitute harassment. Even so, we are confident that wherever the line for school district liability for peer-peer harassment is drawn, the facts of plaintiff's complaint, if true, support it [956 F. Supp. at 1214].

* * * * *

It is generally accepted that there is no individual liability for either peer or teacher/employee harassment under Title IX. Since individual school district employees are not "education programs or activities" and do not receive federal funds, Title IX binds only the school district. In *Collier v. William Penn School District*, 956 F. Supp. 1209 (E.D. Pa. 1997), the court enumerated cases, including *Franklin* and *Lipsett*, supporting the view that individuals cannot be sued in their individual capacities under Title IX. Few courts have addressed whether school employees can be sued in their official capacities under Title IX. In *Doe v. Lance*, No. 3:95-CV-736RM, 1996 U.S.

Dist LEXIS 16836 (N.D. Ind. October 30, 1996), the court seemed willing to permit a Title IX suit against a school superintendent in her official capacity, but held that such a suit against the superintendent was the same as a suit against the school district itself. Because the school district was already a party to the lawsuit, the court dismissed the claim against the superintendent in her official capacity because it afforded plaintiff "no additional avenue of relief."

* * * * *

The U.S. Court of Appeals for the Eighth Circuit has addressed several novel claims and defenses under Title IX. In *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997), the plaintiff, a student at the University of Central Arkansas, had charged one of her instructors with sexual harassment. Although the university discharged the instructor, the student sued the university and several administrators under both section 1983 (LHE 3d, Section 2.3.3) and Title IX on the following grounds: 1) strict liability for the harassment under a respondeat superior theory; 2) "failure to train" university employees; and 3) participation by officials in the harassment because of the manner in which the complaint was handled.

The university contended that the decision of the U.S. Supreme Court in *Seminole Tribe of Florida v. Florida* (this Supp., Section 7.1) deprived the court of jurisdiction to hear the plaintiff's Title IX claim. Asserting that Congress passed Title IX under the Spending Clause and the Interstate Commerce Clause, the University asserted that Title IX could not be applied to public institutions. On the contrary, said the court, Title IX's language clearly indicates Congressional intent to abrogate Eleventh Amendment immunity; furthermore, Congress could have enacted Title IX under the authority of the Fourteenth Amendment, given the fact that the Fourteenth Amendment has been used to proscribe gender discrimination, the most recent and notable example being the decision of the U.S. Supreme Court in *United States v. Commonwealth of Virginia* (this Supp., Section 4.2.4.2). Thus, the court rejected the university's *Seminole* defense.

Next, the university argued that the plaintiff could not use the remedial scheme of Section 1983 to enforce her Title IX claims. Although the court noted that there is a split among the appellate courts with respect to whether Title IX subsumes claims brought under Section 1983, this court ruled that, because Title IX lacks a "sufficiently comprehensive remedial scheme," it could find "no evidence that Congress intended to foreclose the use of section 1983 to redress violations of Title IX" (109 F.3d at 1284).

With respect to the plaintiff's "failure to train" claim and her assertion that officials "participated" in the harassment because of the inadequacy of their response to her complaint, the court allowed those claims to go to trial. Although the participation claim is not an unusual one in a sexual harassment claim, whether brought under Title VII or Title IX, the failure to train claim, if courts recognize it, may result in a new theory of negligence for colleges that do not train their employees -- including faculty -- about harassment.

Sec. 7.6. Dealing with the Federal Government

7.6.1. Handling federal rule making and regulations. The Administrative Dispute Resolution Act of 1996 (Pub. L. No. 104-320, 110 Stat. 3870), amending the Administrative Dispute Resolution Act of 1990 (Pub. L. No. 101-552, 104 Stat. 2736), authorizes the use of alternative methods of dispute resolution to resolve conflicts with federal agencies that arise under an "administrative program." Under the Act, which is codified at 5 U.S.C. §§ 571-573, an "administrative program" is defined as "a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation" (5 U.S.C. §571(2)). The alternative dispute resolution methods encouraged by the Act are "conciliation, facilitation, mediation, factfinding, minitrials, arbitration, and use of ombuds" (5 U.S.C. §571(3)). The Act facilitates the use of such alternative dispute resolution techniques and provides for their availability when the parties agree to their use; they are voluntary and are intended to supplement rather than replace other agency dispute resolution techniques (5 U.S.C. §§ 572(a) & (c)).

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The recent case of *California Cosmetology Coalition v. Riley*, 110 F.3d 1454 (9th Cir. 1997), provides another instructive example of a successful challenge to a federal regulation (a Department of Education regulation implementing federal loan programs) on grounds that it is "ultra vires" (see LHE 3d. p. 851).

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Sec. 7.2 (Federal Regulation of Postsecondary Education)

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Sec. 7.3 (Federal Taxation of Postsecondary Education)

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7.5 (Civil Rights Compliance)

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VIII

The College and the Educational Associations

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Sec. 8.3. The College and the Accrediting Agencies

8.3.2. Accreditation and the courts.

8.3.2.1. Formative developments. The case of *Chicago School of Automatic Transmissions v. Accreditation Alliance of Career Schools and Colleges*, 44 F.3d 447 (7th Cir. 1994), provides an important new perspective on the judicial review of accrediting agency decisions. In rejecting the school's claim against the accrediting agency, the court relied on the new guidelines included in the Higher Education Amendments of 1992, 20 U.S.C. §1099b(e) & (f) (see LHE 3d, p. 877). The court's analysis serves to give added importance to federal law in the review of accrediting agency decisions, and to diminish the importance of state law.

The litigation commenced after the defendant accrediting agency refused to renew the plaintiff's accreditation because the school had failed to provide prompt refunds of tuition money to withdrawing students. The school claimed that the agency's action violated the agency's own rules and therefore constituted a breach of contract under Illinois state law. The agency argued, to the contrary, that the case should be reviewed under principles of federal administrative law and the federal Administrative Procedure Act. The court agreed with the defendant's perspective on the case:

> Accreditation serves a federal function, and two years ago (shortly after the commencement of this action under the diversity jurisdiction), Congress provided for exclusive federal jurisdiction of any suit by a school or college protesting the denial or withdrawal of accreditation [by a recognized accrediting agency]. Congress did not specify a source of law for these suits, but it is hard to see how state law could govern when federal jurisdiction is exclusive . . . . [I]t is all but impossible to see how federal courts could apply state law to the actions of accrediting agencies when state courts have been silenced by the provision for exclusive jurisdiction. If a grant of federal jurisdiction sometimes justifies creation of federal common law, *see Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957) . . . , a grant of exclusive federal jurisdiction necessarily implies the application of federal law [44 F.3d at 449].

The court also argued that the federal courts, when shaping a federal law for accreditation, should not derive its principles from the contract law or other common law of the states:

> [A]ccrediting bodies are not engaged in commercial transactions for which state-law contract principles are natural matches. The "contract" the School wants to enforce is not a bargained-for exchange but a set of rules developed by an entity with many of the attributes of an administrative agency. [Moreover,] [a]lthough the law of every state contains a set of rules for the conduct of voluntary associations, distinct from the law of contracts, this too is not quite the right match; the School did not apply to "join" the Alliance. It wanted a key that would unlock the Federal Treasury. An accrediting agency is a proxy for the federal department whose spigot it opens and closes [44 F.3d at 449].

The court therefore concluded "that principles of federal administrative law supply the right perspective for review of accrediting agencies' decisions. Section 1099b (f) cements the case for the application of federal law."

Using rudimentary administrative law principles, the court then determined that the defendant agency had not violated its own procedural rules in refusing to renew the plaintiff school's accreditation. Alternatively, in response to one of the school's arguments, the court also noted that if the defendant had departed from one of its rules, "it was a harmless departure" which would not "lead to the whopping damages the School requests . . . ."

For the most part, the federal law perspective of the court in *Chicago School of Automatic Transmissions* should not substantially alter the reasoning or result in accreditation cases. The court itself did note one potentially significant difference:

> If this were a contract dispute, we would have to make an independent judgment about the meaning of . . . the Alliance's [rules and] internal operating procedures. In administrative law, however, the first question is how the agency understands its own rules -- for an agency possessed of the ability to adopt and amend rules also may interpret them, even if the interpretation chosen is not the one that most impresses an outside observer [44 F.3d at 450].

But this difference may not be as great as the court makes it appear, since there is already running room within the common law for courts to find ways to defer to accrediting agencies' interpretive judgments about their own rules. The common law principles applicable to accrediting decisions (see LHE 3d, Section 8.3.2.2) already parallel basic administrative law principles in many important respects. Moreover, the court appears to leave some room for federal courts to borrow from the state common law of voluntary associations (see LHE 3d, Section 8.2) when the accrediting agency is a "membership association" (see LHE 3d, Section 8.3.1 (p. 873)) that schools actually *join*.

Federal antitrust law (LHE 3d, Section 8.3.2.4), the federal constitutional law of "state action" (LHE 3d, Section 8.3.2.3), and federal bankruptcy law (LHE 3d, Section 8.3.26.) will not be affected by the court's determination in *Chicago School of Automatic Transmissions*. And the court's opinion, like the federal statute upon which it relies (20 U.S.C. § 1099b(f)), applies only to disputes concerning the denial or withdrawal of accreditation. Thus, defamation claims such as those in *Avins v. White* (LHE 3d, Section 8.3.2.5), other tort claims such as those in *Keams v. the Tempe*

Technical Institute (this Supp., Section 8.3.2.5), and other accreditation issues not directly challenging the accrediting decision itself, should continue to be governed by state common law principles.

8.3.2.2. Common law. The state common law principles in this section, as they apply to judicial review of decisions to deny or withdraw accreditation, must be reconsidered in light of the recent *Chicago School of Automatic Transmissions* case; see the discussion of this case in this Supplement, Section 8.3.2.1.

8.3.2.4. Antitrust law. Another court has considered the applicability of antitrust law to accreditation. The context was legal education, the same context as the *Zavaletta* case (LHE 3d, p. 885). In *Massachusetts School of Law at Andover, Inc. v. American Bar Association*, 107 F.3d 1026 (3d Cir. 1997), the Massachusetts School of Law at Andover (MSL) alleged that the American Bar Association (ABA) had conspired to monopolize legal education, law school accreditation, and the licensing of lawyers, in violation of the Sherman Act. Specifically, MSL alleged that the ABA established and enforced anticompetitive criteria in making accreditation decisions, that application of these criteria to MSL resulted in the denial of its application for provisional accreditation, and that this denial put MSL "at a competitive disadvantage in recruiting students because graduates of unaccredited schools [cannot] take the bar examination in most states" and caused the school "to suffer a 'loss of prestige' and direct economic damage in the form of declining enrollments and tuition revenue."

Regarding the ABA's accreditation criteria, MSL alleged they created an anticompetitive effect by:

> [1] fixing the price of faculty salaries; [2] requiring reduced teaching hours and non-teaching duties; [3] requiring paid sabbaticals; [4] forcing the hiring of more professors in order to lower student/faculty ratios; [5] limiting the use of adjunct professors; [6] prohibiting the use of required or for-credit bar review courses; [7] forcing schools to limit the number of hours the students could work; [8] prohibiting ABA-accredited schools from accepting credit transfers from unaccredited schools and from enrolling graduates of unaccredited schools in graduate programs; [9] requiring more expensive and elaborate physical and library facilities; and [10] requiring schools to use the LSAT [107 F.3d at 1031-32].

The appellate court held federal antitrust laws to be generally applicable to accrediting activities, but it did not find the ABA's enforcement of accreditation criteria to be in violation of these antitrust laws. The court thus affirmed the trial court's grant of summary judgment to the ABA.

In rejecting MSL's assertion that it suffered a competitive disadvantage in recruiting because graduates of MSL were prohibited from taking the bar examination in most states, the appellate court relied on the holding in *Parker v. Brown* (LHE 3d, Section 7.2.13 (p. 763)) to shield the ABA from liability. The court stated that "every state retains final authority to set all the bar admission rules . . . . [T]he [alleged] injury is the result of state action and thus is immune from antitrust action under [*Parker*] . . . . Without state action, the ABA's accreditation decisions would not affect state bar admissions requirements" [107 F.3d at 1036]. Since the state determines that graduation from an ABA-accredited school is required to sit for the state bar examination, the ABA merely "assist[s] [the states] in their decision-making processes" and cannot be held liable for any competitive disadvantage MSL may suffer in recruiting students.

The court then addressed the "stigmatic effect [MSL has allegedly suffered] in the marketplace [as the result] of the denial of accreditation." MSL claimed that "the ABA has conducted a campaign to convey the idea that . . . [it] is the most, or only, competent organization to judge law schools." Relying on the *Noerr* case (LHE 3d, Section 7.2.13 (pp. 764-65)), the court held that the ABA's annual communication of its accreditation decisions to states was sufficient "petitioning activity" to grant the ABA immunity from any stigmatic effect its accreditation decision may have had on MSL. Any stigmatic injury suffered by MSL was merely incidental to the competitive disadvantage it suffered as a result of individual state requirements that individuals graduate from an ABA-accredited school prior to sitting for the bar examination.

The court concluded by addressing MSL's allegation that, as a result of the ABA accreditation criteria, it suffered "direct injury" in the form of increased faculty wages, declining enrollments, and declining tuition revenue. The court held that MSL failed to introduce any evidence that it suffered direct injury from ABA conduct that was not immunized by the *Parker* or *Noerr* cases.

8.3.2.5. Defamation law. In *Keams v. Tempe Technical Institute*, 39 F.3d 222 (9th Cir. 1994), the appellate court addressed a new and specific issue concerning the judicial role in accreditation cases: whether the Higher Education Act preempts state tort claims by students against accrediting associations. (Only the accrediting associations were defendants for purposes of this appeal). The trial court had ruled that the Higher Education Act preempted state tort claims against the agencies, and also that the Act did not provide for a private right of action by students against accrediting agencies. The appellate court reversed, finding no evidence in the Higher Education Act of a Congressional intent to preempt state tort claims. Indeed, said the court, since it was difficult for the U.S. Secretary of Education to police the accreditors, and the schools and accrediting agencies had common interests in many respects, the students' "interest in honest and effective accreditation may be more effectively vindicated by private tort suits in state court" (39 F.3d at 227). Thus, the students could proceed with their negligence action against the accrediting agencies.

The *Keams* litigation thus adds additional tort claims, beyond defamation, to the list of common law claims that may be asserted against accrediting agencies, and thereby expands the bases upon which courts may review accrediting agency decisions. In a later proceeding, however, the trial judge dismissed the students' negligence claims on the merits, ruling that state law had not recognized a duty of care that would create liability under the facts alleged by the students, and the appellate court affirmed (*Keams v. Tempe Technical Institute*, 103 F. 3d 138 (9th Cir. 1996)).

Sec. 8.4. Athletic Associations and Conferences

8.4.2. State statutes regulating athletic associations' enforcement activities. The *Miller* case was relied on in *NCAA v. Roberts*, 1994 WL 750585 (N.D. Fla. 1994), a case in which the court used the commerce clause to invalidate the Florida statute cited in LHE 3d, p. 897.

8.4.3. Antitrust laws. In *Hairston v. Pacific 10 Conference*, 101 F.3d 1315 (9th Cir. 1996), football players at the University of Washington challenged a Pac-10 decision placing the football team on probation and levying sanctions against it for recruiting violations. As in the *Banks* case (LHE 3d, p. 900), the challenge was based on Section 1 of the Sherman Act. The argument was that the conference's sanctions constituted an unreasonable restraint of trade, and the court employed the "rule-of-reason" analysis. The court held in the defendant's favor because it had submitted evidence "showing that there are significant pro-competitive effects of punishing football programs that violate the Pac-10's amateurism rules," but the plaintiffs had not produced any evidence that "the Pac-10's pro-competitive objectives could be achieved in a substantially less restrictive manner."

8.4.4. Common law principles. In *Hairston v. Pac-10 Conference*, a case discussed in Section 8.4.3 of this Supplement, the plaintiff football players also argued that the Pac-10's sanctions violated the conference's constitution, bylaws, and articles. In order to make such an argument, the plaintiffs had to show not only that the Pac-10's documents created a contract between the conference and its member institutions, but also that "the players were third-party beneficiaries of this contract." The court did not challenge the first premise, but it did reject the second premise because the plaintiffs "have not demonstrated that the parties [the university and the conference] intended to create direct legal obligations between themselves and the students." The case is therefore distinguishable from, but an interesting contrast to, the case of *California State University, Hayward v. NCAA* (LHE 3d, Section 8.4.4) which was a suit brought by the institution itself rather than by its student-athletes and therefore required no third-party beneficiary arguments.

* * * * *

The quoted language that appears on the bottom of page 901 through the top of page 902 of LHE 3d should read as follows:

> [C]ourts will intervene in the internal affairs of associations where the action by the association is in violation of its own bylaws or constitution. "It is true that courts will not interfere with the disciplining or expelling of members of such associations where the action is taken in good faith and in accordance with its adopted laws and rules. But if the decision of the tribunal is contrary to its laws or rules, [or] it is not authorized by the by-laws of the association, a court may review the ruling of the board and direct the reinstatement of the member" [quoting another case] [121 Cal. Rptr. at 88, 89].

IX

The College and the Business/Industrial Community

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Sec. 9.2. The College as Purchaser

9.2.2. Purchase of services. A 1997 case, *Linkage Corp. v. Trustees of Boston University*, 679 N.E.2d 191 (Mass. 1997), provides an outstanding example of problems that can arise when an institution seeks to purchase *instructional* services. The case also illustrates the applicability of a state statute, rather than state common law of contract or tort, to such a purchase arrangement.

As explained by the Supreme Judicial Court of Massachusetts, the "dispute arises out of an agreement between Linkage Corporation (Linkage) and Boston University that called for Linkage to create and provide educational, training, and other programs of a technical nature at a satellite facility owned by Boston University." Under this agreement, "Linkage initiated a variety of training programs, conferences, seminars, and other offerings for the corporate market. Boston University also transferred some university courses to [the Satellite Education Center] which Linkage then managed for the university." "Linkage claims that the agreement was renewed by Boston University and then unlawfully terminated; Boston University claims that the agreement was lawfully terminated and never renewed." The court agreed with Linkage and thus held the university liable for breaching the renewed contract. In addition, however, the court also agreed that the university's conduct constituted a violation of a Massachusetts unfair practices statute, G.L. c. 93A. The applicability of this statute was of great importance in the litigation, because the statute authorized the court to double the amount of the damages awarded by the jury and, in addition, to award the successful plaintiff attorney's fees and court costs.

The state statute at issue creates new rights, beyond those afforded by Massachusetts common law of contract and tort. The trial judge found, and the appellate court affirmed, "that Boston University's actions constituted unfair or deceptive practices, and that they constituted willful and knowing violations of the statute." In particular, according to the court, "[t]he university, and its principals, repudiated binding agreements and usurped Linkage's business and work force in order to promote a purely self-serving agenda. The result was to end Linkage's vitality as a going concern, at least until it might be able to reconstitute itself with its main mission still intact."

Before holding the university liable under G.L. c. 93A, the court addressed two important threshold issues: first, whether the interaction between the parties was "commercial" in character; and second, whether the parties to the dispute were both engaged in "trade or commerce" and therefore acting in a "business context." Regarding the first issue, the problem was whether the interaction between the parties was an "intra-enterprise" dispute -- such as a dispute between employer and employee or between partners in a partnership -- which would not be considered a "genuine commercial transaction" for purposes of the statute. The court held that the transaction was commercial rather than intra-enterprise: "The arrangement between Linkage and Boston University was an arm's-length transaction between two corporations under which Linkage provided services to Boston University and received compensation. Both the base and renewal agreements state that Linkage is 'an independent contractor . . . not an agent or employee of the university,' indicating that, from the very beginning of their relationship, the parties did not intend to be treated as partners or participants in a joint venture."

Regarding the second issue, the problem was whether Boston University, a non-profit corporation, was engaged in trade or commerce when it operated the Satellite Education Center. The court emphasized that an entity's non-profit or charitable status is not itself dispositive of this question and that "a corporation need not be profit-making in order to profit from an activity." The court also emphasized that fees were charged for the services offered at the Satellite Education Center; that the university was "motivated by a strong desire to benefit as much as possible from its arrangement with Linkage as a means of dealing with the debt service and costs of the [Satellite Education Center]; and that the university sought to 'expand its reach . . . to the corporate market [which] provided a. . .lucrative earnings potential . . . .'" The court thus concluded, as to the second issue:

> In most circumstances, a charitable institution will not be engaged in trade or commerce when it undertakes activities in furtherance of its core mission. But when, as in the case here, an institution's business motivations, in combination with the nature of the transaction and the activities of the parties, establish a 'business context'. . . G.L. c. 93A will apply because the institution has inserted itself into the marketplace in a way that makes it only proper that it be subject to rules of ethical behavior and fair play [679 N.E.2d at 209].

Thus having determined that the unfair practices statute applied to the transaction between Boston University and Linkage, and that Boston University had violated the statute, the court doubled Linkage's damage award (from $2,411,852 to $4,823,704) and awarded attorney's fees and costs to Linkage in the amount of $899,382.

9.2.4. The special case of design and construction contracts. In *McMaster Construction, Inc. v. Board of Regents of Oklahoma Colleges*, 934 P.2d 335 (Okla. 1997), unsuccessful bidders sought to use Oklahoma's Competitive Bidding Act (Okla. Stat. tit. 61 §§101-33 (1991)), to void construction management contracts awarded by the University of Central Oklahoma for the oversight of capital improvements projects on the university campus. The Supreme Court of Oklahoma rejected the plaintiffs' argument that the Regents had failed to comply with the state's Competitive Bidding Act (Okla.

Stat. Tit. 61 §§ 101-33), holding that the construction management contracts were not subject to the Act because the contracts were for personal services requiring professional judgment and did not involve constructing part of the improvements or supplying materials. The court also rejected the plaintiffs' arguments that the contracts did not comply with the Public Building Construction and Planning Act or with the State Consultants Act; the former act expressly excluded the Regents from coverage and the latter act covered only architectural, engineering, and surveying services -- categories into which the construction services contracts "did not fall."

Sec. 9.3. The College as Seller/Competitor

9.3.5. Taxation.

9.3.5.2. State and local taxation. The case of *University of Michigan Board of Regents v. Department of Treasury*, 553 N.W. 2d 349 (Mich. 1996), provides another example of an educational institution's success in insulating particular auxiliary activities from taxation. The taxes at issue were sales and use taxes levied pursuant to Michigan statutes. The Michigan Department of Treasury had assessed sales taxes on the university's sale of photocopies at photocopy machines in the university libraries, dormitories, and the student union; on the sale of replacement diplomas to graduates; and on meals provided for participants in summer sports camps and an executive development program. It had also assessed use taxes on revenues from overnight guest rooms and cots rented in a residence hall. The Michigan appellate court overruled the Department of Treasury's refusal to exempt the Board of Regents from these taxes. The court rejected the tax on the photocopying because these sales were not profit-making and were incidental to the operations of an academic enterprise (the library). The court rejected the tax on the diplomas because the product was unique and the sale was not done for reasons of profit; and rejected the tax on the sale of meals because these sales were to students who, even though they were enrolled in non-degree granting programs or were students in high schools and elementary schools, were nevertheless considered to be "bonafide enrolled students." The tax on the room and cot rentals was rejected because the rentals furthered an educational purpose, were not for purposes of profit, and were not available to the general public.

Sec. 9.4. The College as Research Collaborator and Partner

9.4.3. Patent law. Technical procedural and evidentiary issues may also arise in litigation concerning patent rights. The recent case of *In re Regents of the University of California*, 101 F.3d 1386 (Fed. Cir. 1996), provides an example. The dispute concerned patent and licensing rights regarding recombinant-DNA discoveries, and there were three parties to the dispute: Genetech, Inc., Eli Lilly & Co., and the university. In a suit brought by Genetech, a biotechnology firm, issues arose concerning whether the attorney-client privilege (see LHE 3d, Section 1.4.3.3.) applied to communications between the university (the patent owner and patent applicant) and the attorneys for Eli Lilly (the university's licensee). The court held that, under the "community of interest" doctrine and the "joint client" doctrine, the privilege applied and protected the communications from discovery by Genetech.

9.4.7. Conflicts of interest. The National Science Foundation (NSF) has published technical amendments to its 1994 "Investigator Financial Disclosure Policy" (LHE 3d, p. 961). The NSF changes (60 Fed. Reg. 35820 (July 11, 1995)) were enacted to make the policy more consistent with the final rule on conflicts of interest published by the Department of Health and Human Services (HHS) on the same date (60 Fed. Reg. 35810 (July 11, 1995)). The two sets of rules establish the conditions, procedures, and requirements for disclosure of actual or potential conflicts of interest for recipients of federal research funds from these two agencies.

Persons responsible for designing, conducting, or reporting on research ("investigators") are required to disclose "significant financial interests" (including those of the investigator's spouse or dependent children) that would "reasonably appear to be affected" by the activities funded or proposed for funding by the NSF or HHS (60 Fed. Reg. 35820, 35815; 60 Fed. Reg. 35810, at 35815). Disclosure is made to an institution-appointed representative or reviewer ("reviewer") who is responsible for determining whether the "significant financial interest" could "directly and significantly affect the design, conduct, or reporting" of NSF or HHS funded activities; in other words, for determining whether a conflict of interest exists. A "significant financial interest" is anything of monetary value, including, for example: salary or payment for services, other than from the applicant institution, the aggregate of which over 12 months exceeds $10,000; equity interests in excess of $10,000 in value or equal to more than 5% ownership in a single entity; and intellectual property interests (60 Fed. Reg. 35820, 60 Fed. Reg. 35810, at 35816).

Each institution receiving funds is required to maintain and enforce a written conflicts of interest policy. Under this policy, the reviewer must identify, evaluate, and resolve conflicts of interest that need to be managed, reduced, or eliminated. The reviewer reports to the granting agency (NSF or HHS) only those conflicts that cannot be satisfactorily managed, reduced or eliminated. Both NSF and HHS mandate that financial disclosures be updated annually during the period of an award, or as new significant financial interests arise. Institutions must keep records of all financial disclosures for 3 years after the expiration of an award or grant (42 C.F.R. §§6.04 & 6.05).

The NSF exempts grantees with less than 50 employees from its Financial Disclosure Policy. The HHS specifically rejects this exemption because it has found that small entities receiving HHS grants are just as susceptible to conflict-of-interest problems as large entities (60 Fed. Reg. 35810, at 35812). Both NSF and HHS published substantial comments with their rules that provide helpful guidance to universities and colleges seeking to comply with these requirements (60 Fed. Reg. 35810-35823).

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National Association of College and University Attorneys
One Dupont Circle, N.W., Suite 620
Washington, D.C. 20036
TEL 202-833-8390
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